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23215

United States Court of Appeals

FOR THE SECOND CIRCUIT

CAPITOL RECORDS, INC.,

Plaintiff-Appellee,

against

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MERCURY RECORDS CORPORATION,

Defendant-Appellant.

PLAINTIFF-APPELLEE'S BRIEF

ARTHUR E. GARMAIZE,
Attorney for Plaintiff-Appellee.

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To be argued by
ARTHUR E. GARMIZE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CAPITOL RECORDS, INC.,
Plaintiff-Appellee,

against

MERCURY RECORDS CORPORATION,
Defendant-Appellant.

PLAINTIFF-APPELLEE'S BRIEF

Nature of the Action

This is a case of unfair competition based on diversity of citizenship and the statutory amount in controversy.

Plaintiff-appellee sought and secured a declaration that the defendant-appellant * is guilty of unfair competition, that it be enjoined, pay plaintiff damages, and account for profits. The subject matter of the unfair competition is the defendant's manufacture and sale of phonograph records produced from derivatives of masters and matrices admitted to have been initially and originally recorded by and for plaintiff's grantor (Judge Leibell, 109 F. Supp. 330, 330).

The matter is now before Special Master Hon. Thomas F. Reddy, Jr.

* The parties will be called plaintiff and defendant

After several Pre-Trial Hearings the case was tried without a jury on the complaint, answer, reply, a Pre-Trial Conference Order which included a lengthy stipulation of facts, and a stipulation admitting 25 lengthy exhibits.

The plaintiff's right to manufacture and sell the original recordings flows from the original German owner of the recordings and from the Control Council in occupied Germany in which was vested all right, title and interest in all German external assets and from its instrumentality the Joint Export-Import Agency which approved the plaintiff's contract. The defendant manufactures and sells the original recordings from derivatives which it claims under a seizure, made one year after its contract, by Czechoslovakia* for nationalization purposes of German external assets in the form of such derivatives held in custody in Czechoslovakia.

The Question Presented

Thus the question is: what could Czechoslovakia have seized and transferred to justify the defendant in copying the original recordings for competition with the plaintiff?

The defendant moved in this Court for an extension of time to docket the appeal in typewritten form and to limit review to two specified questions. The defendant now includes in its brief arguments on three additional questions represented by its Points III, IV and V. The plaintiff will meet them very briefly.

The Facts Giving Rise to the Question Presented

The chronological facts stated with a minimum of comment are:

Telefunkenplatte G.m.b.H., a corporation of, and always domiciled in, Berlin, Germany (hereinafter called "Telefunken"), with the approval on October 1, 1948, of the Joint

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* The seizure decrees, Exhibits K to P, are printed in plaintiff's appendix

Export-Import Agency, Berlin Branch, United States Sector, stamped upon the written agreement, is the plaintiff's grantor (Ex. S).

Telefunken is engaged in the business of recording upon masters and matrices artists whose exclusive services are contractually acquired and in the manufacture and sale of phonograph records produced from such masters and matrices (Exs. A to I).

In 1941 Telefunken entered into an agreement with Ultraphon Actiengesellschaft fur Grammophon Industrie und Handel, of Prague, Czechoslovakia (hereinafter called "Ultraphon"). The agreement loaned matrices to, and to be held in custody by, Ultraphon. The records to be manufactured were to be sold only within Czechoslovakia. Telefunken retained title to the matrices. The agreement provided:

Ex. J, par. 4, clause 2:

> "A transfer of these mother matrices or matrices, resp. to third persons is not permitted to you." (Ultraphon.)

Ex. J, par. 16, clause d:

> "In case of termination of this agreement for whatever reason, the following shall apply:
>
> All mother matrices or matrices, resp. * * * which are in your (Ultraphon's) possession are to be destroyed within 30 days under the supervision of a trustee appointed by us (Telefunken). The raw material resulting therefrom is at our (Telefunken's) disposal."

The laws of Germany and Czechoslovakia clothe the performances of artists for recording on phonograph records with attributes of property rights (Exs. V and W).*

The Telefunken-Ultraphon agreement just described (Ex. J) did not convey any interest whatsoever in the property rights in the recordings, recognized in each country.

* Exhibits V and W are printed in plaintiff's appendix

United States Military Government in Germany

On August 2, 1945, the four victorious powers signed the Potsdam agreement and vested supreme authority over military, political and economic matters in Germany in a Control Council. The text of the provision follows:

> "III A 1 In accordance with the agreement on control machinery in Germany, supreme authority in Germany is exercised on instructions from their respective Governments, by the Commander in Chief of the Armed Forces of the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, and the French Republic, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole, in their capacity as members of the Control Council." (13 Dept. State Bulletin, No. 319, August 5, 1945, pp. 153, 154.)

On August 30, 1945, Proclamation No. 1 established the Control Council and conferred upon it supreme authority in matters affecting Germany as a whole. It reads in part:

> "II In virtue of the supreme authority and powers thus assumed by the four Governments the Control Council has been established and supreme authority in matters affecting Germany as a whole has been conferred upon the Control Council." (Official Gazette of the Control Council for Germany, Number 1, October 29, 1945.)

On October 30, 1945, Law No. 5 vested in a Commission created by the Control Council all right, title and interest in all German external assets, except those located within the four occupying powers. The vesting was accomplished in these words:

> "Article II All rights, titles and interests in respect of any *property outside Germany* which is owned or controlled by any person of German nationality inside Germany are hereby vested in the German External Property Commission." (Official Gazette of the Con-

trol Council for Germany, Number 2, 30 November 1945.) (Emphasis added.)

On December 2, 1946 the United States and the United Kingdom executed a formal agreement (Bevin-Byrnes) which, among other matters, provided for a single Joint Export-Import Agency to take complete jurisdiction over the export and import business in both their occupied zones of Germany. (61 U. S. Stat. 2475) and which was later amended and reduced to the form of a charter (January 19, 1948, Germany 1947-1949, The Story in Documents, Department of State Publication, p. 4033). Military Governors Clay and Robertson on January 1, 1947, issued an order[1] creating the Joint Agency, and on October 21, 1947, Military Government License No. 3, issued under Military Government Law No. 53, opened trade, subject to licensing by the Joint Export-Import Agency, between Germany and the United States. Theretofore, on March 4, 1947, the United States had amended General License No. 94 under Executive Orders No. 8389 and 9193 and Section 5 (b) of the Trading With the Enemy Act opening up trade with Germany. Military Government License 3 provides, however, for the approval by the Joint Export-Import Agency of all transactions:

> "1 A A General License is hereby granted licensing all transactions within the United States Zone of occupation in Germany which are necessary in connection with and incidental to the export of property from such Zone to any country outside Germany except Spain, Japan and their dependencies provided that:
>
> C All such transactions are in conformity with any other terms, conditions and regulations which may be prescribed by the Joint Export-Import Agency (US UK) or other authorized designees of Military Governments for Germany (US UK)." (Military Government Gazette, Germany, United States Area of Control, Issue F, October 31, 1947, p. 12.)

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[1] BHE policy 25 (2nd Revision) Bipartite Board Paper, Feb 3, 1947, retroactive to January 1, 1947 Restricted

The effect of all of the events and instruments described and quoted above was (1) that the Control Council acquired title to the derivative matrices in custody in Czechoslovakia (also an occupied country) as external assets; (2) that the Control Council through its instrumentality, the Joint Export-Import Agency, authorized Telefunken to enter into agreement to supply the plaintiff with derivative matrices located in Germany and those located in Czechoslovakia through vesting of external property; (3) that the Control Council authorized Telefunken to include in its agreement with plaintiff, Telefunken's property right in the original recordings having a situs in Berlin, the domicile of Telefunken, of which the Control Council also had unquestioned jurisdiction.

Hence the plaintiff's links in the chain of right to manufacture and sell the original Telefunken recordings are absolutely complete to enjoin copying of the recordings unless by the seizure in Czechoslovakia the right of the plaintiff's grantor ceased and defendant's grantor acquired that right.

The events and instruments under which the defendant claims will now be stated. They consist of the Czechoslovakian decrees, the Paris Treaty and its Adjunct relating to war reparations.

In the Potsdam agreement the four victorious powers made provision for reparations from Germany and agreed that the United States and the United Kingdom would share their claims with other nations out of the Western Zones and from the *appropriate* German *external assets*. The provisions read:

> "IV. 3. The reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the Western zones and from appropriate German external assets." (13 Dept. State Bulletin, No. 319, August 5, 1945, pp. 153, 157.)

These German external assets the Potsdam Agreement and Control Council Law No. 5 vested in the Control Council, the supreme authority under the Potsdam Agreement over reparations, before Czechoslovakia issued its decrees upon which defendant relies.

Czechoslovakian Nationalization Decrees

On October 24 and 25, 1945, Czechoslovakia issued general decrees announcing respectively the nationalization of industries including the phonograph record manufacturing industry and the confiscation of the property of Germans, without providing for compensation (Ex. K). Obviously until implementing decrees were issued these general decrees did not seize nor take title to anything tangible or intangible. They made no reference to War Reparations. They are ineffective if in conflict with the Potsdam Agreement and Control Law No. 5. The supplemental decrees, treated later in detail, issued to implement the general decrees, were confined to property physically located within the Czechoslovak Republic and likewise made no mention of War Reparations. The general and supplemental decrees deal only with nationalization. The supplemental decrees created a governmental instrumentality named Gramophone Works National Corporation (hereinafter called "Gramophone") to administer the nationalized phonograph record industry.

The supplemental decrees were issued after Control Council Law No. 5 vested in the Control Council all German external assets. The contents of each supplemental decree will now be stated in chronology with defendant's agreement.

Decree Exhibit L dated December 27, 1945, No. 923 decreed the seizure of property of "Telefunkenplatte Für Drahtlose Telegraphie G.m.b.H." This corporation is not the plaintiff's grantor. There is no evidence in the Record

on Appeal that it held any matrices of Telefunkenplatte G.m.b.H., the plaintiff's grantor.

It should be observed as a pattern of these decrees that the property seized is limited in the decree to physical property that is "situated within the boundaries of the Czechoslovakian Republic."

Decree Exhibit M, dated December 27, 1945, No. 925, decreed the seizure of Ultraphon property. There is no evidence in the Record on Appeal that any of Telefunken's property was thereby seized. The Record shows that Ultraphon had no title in Telefunken's matrices, derivatives or recordings.

Decree Exhibit N, dated March 7, 1947, No. 1251, decreed the creation of the governmental instrumentality Gramophone to administer the nationalized phonograph record industry and decreed the transfer to it of property theretofore decreed seized.

Exhibit Q is the Gramophone-defendant agreement of November 6, 1947. This agreement could only apply to property theretofore decreed seized and transferred to Gramophone. No decree issued up to November 6, 1947, had yet attempted to seize or to transfer to Gramophone anything belonging to plaintiff's grantor. Hence the agreement of November 6, 1947, under which defendant claims, is a nullity with respect to any property or property interest of Telefunken, plaintiff's grantor.

Decree Exhibit O, dated November 27, 1948, No. 3173, is the first decree issued bearing upon Telefunkenplatte G.m.b.H., the plaintiff's grantor, and decrees seizure *as far as its property and furnishings are located within the Czechoslovak Republic* (par. 3).

However, the title to this property was vested in the Control Council by the Potsdam Agreement and by Control Council Law No. 5 on August 2, 1945, and on October 30,

1945. This conflict is resolved in favor of the Control Council under appropriate agreements later considered.

Decree Exhibit P, dated November 29, 1948, No. 3174, is also the first decree issued transferring to Gramophone the property of Telefunken *located within the Czechoslovak Republic* decreed seized two days before, and the transfer is *to the extent of its nationalization.*

While the decreed transfer to Gramophone is retroactive, it is to be observed that *the decreed seizure two days before is not made retroactive.* It follows then most definitely that at the time the defendant-appellant made its contract with Gramophone on November 6, 1947, Gramophone had no title to the Telefunken property located within the Czechoslovak Republic. The record is devoid of anything showing that Gramophone by a subsequent instrument conferred upon the contract of November 6, 1947, the benefits of the retroactive transfer decree just mentioned.

Hence the chronological order of events in relation to the Gramophone-defendant Mercury agreement of November 6, 1947, demonstrates that defendant's grantor at that date had no claim of any nature to Telefunken's property, tangible or intangible, and, in consequence, the defendant has no defense based upon said agreement for its unfair competition.

Paris Treaty and Its Adjunct

On January 14, 1946, the Paris Treaty became effective. In it the United States and the United Kingdom pursuant to the Potsdam agreement set out the shares of war reparations out of the Western Zones for each signatory of which Czechoslovakia was one.

Czechoslovakia had already in 1945 issued decrees for the seizure and nationalization of industries. Czechoslo-

vakia and the defendant could not therefore claim that the nationalization decrees were issued to implement the following War Reparation paragraphs of the Paris Treaty:

> "Article 1, F. The Inter-Allied Reparations Agency, to be established in accordance with Part II of this Agreement, shall charge the reparation account of each Signatory Government for the German assets *within that Government's jurisdiction over a period of five years.*" (Emphasis added.) 14 Dept. State Bulletin 114, 115; 61 U. S. Stat. (3) 3157, 3169.
>
> "Article 6, A. Each signatory government shall, under such procedures as it may choose, hold or dispose of German enemy assets *within its jurisdiction* in manners designed to preclude their return to German ownership or control and shall *charge against its reparations shares such* assets * * *." (Emphasis added.) 14 Dept. State Bull. 114, 117; 61 U. S. Stat. (3) 3157, 3168.
>
> "Article 6, B. The Signatory Governments shall give to the Inter-Allied Reparation Agency all information for which it asks as to the value of such assets and the amounts realized from time to time by their liquidation." 14 Dept. State Bull. 114, 117; 61 U. S. Stat. (3) 3157, 3169.

On December 5, 1947, conflicting claims to the same German property were resolved by an Adjunct to the Paris Treaty, Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets. Two Articles of the Adjunct are important in the case at bar:

> "Article II. The Agreement shall not supersede any prior agreement concluded between any two or more Parties, or between a Party and another Government not a Party; provided that no such prior agreement between any of the Parties shall adversely affect the rights under the Agreement of another Party not party to the prior agreement, or those of its Nationals." (18 Dept. State Bulletin, January 4, 1948, No. 444, p. 6.)
>
> "Article 20. The assertion of Custodian Control over a German enemy interest in property within the

> territory of one Party *shall not be deemed to have destroyed* the German enemy interest in property within the territory of another party." (18 Dept. State Bulletin, No. 444, January 4, 1948, pp. 6, 12.) (Emphasis added.)

The two parties concerned in the case at bar are Czechoslovakia and the United States acting through the Control Council. Under those two articles even if Czechoslovakia had actually seized Telefunken's derivatives the prior title of the Control Council would not have been destroyed.

POINT I

The laws of New York, Germany and Czechoslovakia recognize a sufficient property right in performances recorded on phonograph records to restrain unfair competition in copying such records.

To the extent, at least, of restraining unfair competition by means of copied phonograph records, the New York courts recognize a property right or interest in artistic performances. As jurisdiction in the case at bar rests upon diversity of citizenship and the statutory amount in controversy, the local law of unfair competition is applicable. *Pechou Lozenge Co. v. National Candy Co.*, 315 U. S. 666, 86 L. Ed. 1103.

Metropolitan Opera Ass'n v. Wanamaker Nichols Recorder Corp., 199 Misc. 786, 101 N. Y. S. 2d 483, affirmed 279 App. Div. 632, 107 N. Y. S. 2d 795, and other cases cited in both, govern the unfair competition in the case at bar.

The Appellate Division, First Department, in the *Metropolitan* case said, p. 797 of 107 N. Y. S. 2d:

> "Defendants' acts, as alleged in the complaint, constitute a misappropriation of the work, skill, expenditure and good will of plaintiffs, and present a case of unfair competition. Moreover, upon this record, these

> property interests of plaintiffs are entitled to protection by injunction pendente lite against acts of infringement induced by defendants' unfair course of business." (Cases cited.)

The Court below cited a host of cases including *Fonotipe, Limited* v. *Bradley*, 171 Fed. 951 and *Mutual Broadcasting System, Inc.* v. *Muzak Corp.*, 177 Misc. 480, 30 N. Y. S. 2d 419. In the last the plaintiff's property interest in its broadcast content was disseminated to the public at large, yet such property interest was held, as in other cases, State as well as Federal, sufficient to warrant protection from appropriation through an unfair course of business.

In the *Metropolitan* case the Court restrained the defendant upon grounds of unfair competition, misappropriation of property rights, interference with contract rights, and invasion of the moral standards of the market place. In recognizing the legal interests and rights of the plaintiffs the Court said:

> "To refuse to the groups who expend time, effort, money and great skill in producing these artistic performances the protection of giving them a 'property right' in the resulting artistic creation would be contrary to existing law, inequitable, and repugnant to the public interest" (p. 497 of 101 N. Y. S. 2d).

Indeed, the New York State courts are vigilant in protecting a property interest against unfair competition. In *Roman Silversmiths Inc.* v. *Hampshire Silver Co. Inc.*, both plaintiff and defendant were engaged in manufacturing and selling silver-plated hollow ware. The record established that those engaged in the same business obtained their materials from the same stampers or other sources and assembled them in accordance with general trade practices and that the designs were standardized throughout the industry. Obviously the plaintiff's articles were not protected by patents, trade marks, designs, trade secrets, or copyrights. The Appellate Division, First Department held:

> "However, defendants should be enjoined from the use of plaintiff's photographs, or photographs from plaintiff's own negatives, and from the use of photographs of any products made only by plaintiff and not by defendants." 1282 App. Div. 21, 121 N. Y. S. 2d 329, 334, 335; rearrangement denied 283 App. Div. 684, 122 N. Y. S. 2d 816, case 31.

Aeolian Co. v. *Royal Music Roll Co.*, 196 Fed. 226, was an action to restrain the defendant from copying and duplicating perforated music rolls or records manufactured by the plaintiff. The music recorded on the rolls or records was free for recording to the whole world under the statutory mechanical license of the Copyright Act, 17 U. S. C. In this respect the *Aeolian* case is on a par with the case at bar. The Court held that the defendant must resort to process of originally recording from the sheet music. In restraining the defendant the Court said at page 227:

> "He (defendant) cannot avail himself of the skill and labor of the original manufacturer (Aeolian Co.) of the perforated roll or record by copying or duplicating the same, but must *resort* to the copyrighted composition or sheet music, and not *pirate* the work of a competitor who has made an original perforated roll." (Emphasis added.)

Grantz v. *Harris*, 2 Cir., 198 F. 2d 356, upon which defendant relies, has no application to the case at bar because a contract regulated the legal relationship between Grantz and Harris. The Court held that contract to be one of sale of masters. Obviously, by virtue of that contract of sale, Harris acquired the title to the masters. Harris as the owner was within his contractual rights in re recording or copying the masters on different speeds. In so copying the masters, Harris could lawfully sell the phonograph records produced therefrom provided he did not describe them as a recording of music *presented* by Grantz. "If he did so describe it, he would commit the tort of unfair competition. *Int'l Mtg. Co.* v. *Whiteman*, 2 Cir., 111 F. 2d 86."

The Court quoted in a note from the *RCA Mfg. Co.* case. The vital holding in that case is that the absolute sale of phonograph records could not be coupled with a restriction preventing their use for radio broadcast. The enjoined description by Harris of the music *presented* by Granz on the records sold was held unfair competition equally as if a broadcast of the performances embodied in the records in the *RCA Mfg.* case were coupled with a declaration that they were live performances. The quotation is from page 60, as follows:

> "Nor need we say that insofar as radio announcers declare, directly or indirectly, that the broadcast of a Whiteman record is the broadcast of a Whiteman performance, that conduct is a tort which Whiteman could enjoin. That would indeed be 'unfair competition'." (*RCA Mfg. Co.* v. *Whiteman.*)

Thus this Court continued to promulgate a standard in the morals of the market place by enjoining the use of a *presentation* in the *Granz* case and the use of a *performance* in the *RCA* case, by means of phonograph records, which are sold or broadcast, under circumstances involving unfairness to the artist.

The *RCA Mfg. Co.* case also emphasized the same standard in the morals of the market place by distinguishing between the *use* of a performance and the *copying* of a performance, by means of a phonograph record, at page 88, where it said:

> "W. B. C. Broadcasting Corporation has never invaded any such right of Whiteman; *they have never copied his performances* at all; they have merely *used those copies* which he and RCA Manufacturing Company, Inc., made and distributed." (Emphasis added.)

Records v. *Hercules*, 2 C. A., 191 F. 2d 911, does not establish any principle that copying of phonograph records of a competitor is not unfair competition. In it the plaintiff claimed that the "engravings" in its engraved edition

of the opera Falstaff were entitled to protection against copying by a photo-engraving process. The Court held the engravings to be mere non-original typography. Because the entire edition of Falstaff was once copyrighted the Court held that *Dutton & Co. v. Cupples*, 117 App. Div. 172, 102 N. Y. S. 309, did not for this reason apply and for the further reason that the original paintings and profuse embellishment of the book in the *Dutton* case distinguished it from mere "typography". Nevertheless, the Court said at page 916:

> "We do not mean that the defendant could under no circumstances be guilty of 'unfair competition' in his use of the 'work'" (Falstaff).

The laws of Germany and Czechoslovakia have created legal interests and rights in a performance, at least insofar as they are recorded upon phonograph records (Exs. V and W). Recognition by the New York courts of such interests and rights is not contrary to any public policy.

The Telefunken-Ultraphon agreement of 1941 was executed with knowledge that such intangible interests and rights were vested in Telefunken. The plaintiff and the defendant stipulated * that the agreement had not been terminated prior to the issue of the Czechoslovakian decrees (Pre-Trial Conference Order par. 3 subdivision 1 p. 4). The Czechoslovakian decrees did not attempt to cancel that agreement. The record is barren of any proof that the agreement was terminated. The United States Court of Claims held that the United States Government cannot unilaterally terminate a private agreement. The holding should apply under the present circumstances that the Czechoslovakian Government is bound by the agreement. The Court of Claims held:

Andrews v. United States, 115 F. S. 901, 902.

> "If, as we held in the Marr case, supra (Marr v. United States, 123 Ct. Cl. 471, certiorari denied 345

* The stipulation is printed in plaintiff's appendix

> U. S. 956, 73 S. Ct. 937 (106 F. S. 204) the notices of settlement issued by the Comptroller General and the acquiescence in these settlements by the claimants constituted accords, contracts that could be sued upon by the claimants, the Government could not unilaterally cancel such contracts. See any dictionary or text defining the word contract."

The provisions of that contract loaning only the matrices and prohibiting their transfer to third parties assume greater significance when the law of both countries (Exs. V and W) is borne in mind. The physical metal matrices are conduits for the intangible interests and rights in the performances. If title to the metal matrices was not transferred, certainly no title to the intangible interests and rights in the performances was transferred. While the location of the metal matrices was changed to Czechoslovakia for purposes of custody, the situs of the intangible rights was never changed by that contract for any purpose and remained as theretofore at Berlin, the domicile of their owner, Telefunken.

That legal situs Czechoslovakia was powerless to change by law, edict, decree or fiat; and so, that Government, during peace or war, for alleged war reparations, for nationalization or for any other purpose, by law, edict, decree or fiat, was powerless to affect title beyond its territorial borders to intangible property rights and interests of which the situs was outside its territorial borders.

Thus the Control Council of the United States Military Government exercised jurisdiction over Telefunken's intangible interest in its performances by reason of their being internal German assets, and over the matrices located in Czechoslovakia by reason of their being external German assets. Czechoslovakia could seize neither because the situs of the German internal assets was in Berlin while the German external assets had already been vested in the Control Council.

By invoking the Paris Treaty on War Reparations, the defendant must admit the foregoing consequences of the Potsdam agreement at the date of the decreed seizure (Ex. 9, No. 3173, dated November 27, 1948). Moreover, prior to the last stated date, the Military Government through the Joint Export-Import Agency on October 1, 1948, approved the Telefunken agreement with the plaintiff over the identical internal and external German assets thereby endowing the plaintiff with complete right to enjoy and enjoin the possession or use of the matrices as physical objects or as vehicles to copy the intangible performances.

POINT II

The Control Council acquired German external assets within the jurisdiction of Czechoslovakia before nationalization. Czechoslovakia commenced nationalization before the Paris Treaty and therefore any seizures, if actually made, were not made pursuant to the Paris Treaty.

Czechoslovakia's policy of nationalizing industries while born in 1945, was attempted to be executed (1) after the Control Council vested in itself all German external assets, and, (2) before the Paris Treaty of January 14, 1946. All texts of decrees issued by Czechoslovakia related solely to nationalization. Not a word appeared in them about the Paris Treaty or war reparations. Czechoslovakia's seizure was clearly not under the Paris Treaty.

The quotations from the Paris Treaty appearing above in the statement of facts show clearly that the German enemy assets were limited to "within the jurisdiction" of the contracting parties.

Such limitation at most applied to the matrice-derivatives in custody of and physically located in Czechoslovakia. The

intangible rights with a situs in Berlin were surely excluded.

The matrice-derivatives would be within the limitation (1) had the Control Council not previously acquired them: (2) had Czechoslovakia actually seized them before plaintiff acquired them: and (3) had not the adjunct to the Treaty of Paris, likewise quoted above in the statement of facts, resolved all conflicts against Czechoslovakia as a party with the United States to the Paris agreement.

It should be remembered that the United States (not Germany) is a party to the Paris agreement and such membership accrues to the benefit of the Control Council.

In any event the fact that at the time the defendant and its grantor made their contract no seizures of Telefunken's matrices had actually occurred, is sufficient to deprive defendant of all rights irrespective of the interpretation of the Paris agreement and its Adjunct.

Answer to Arguments Included in Defendant's Brief Contrary to Its Motion to Limit the Questions to Its Points I and II

NAZI REGIME.

The Telefunken artist contracts are ordinary commercial contracts. They set forth rights and duties of the parties no different than similar contracts made elsewhere. They were impliedly, if not expressly, approved by the Joint Export-Import Agency when that governmental instrumentality physically affixed its official stamp of approval upon the contract between plaintiff and Telefunken.

Judge Leibell considered these artist contracts at pages 334 and at 342 to 343, and concluded that they were not contrary to our own public policy and that the rights under them are enforceable. *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474, 479.

PARTIES

Judge Leibell gave exhaustive consideration to the defendant's contention of indispensable parties it raised for the first time in its brief after the case was submitted to him. Judge Leibell disagreed with plaintiff's contention at pages 334 to 336. The relief Judge Leibell accorded the plaintiff does not affect any interest of Gramophone Works National Corporation about whom defendant now argues.

Prior to the official opening of business relationship between the United States and Germany, no physical assets or property or intangible rights involved in this controversy were ever located or ever had a situs in the United States. Hence the Alien Property Custodian never had and never could have had an interest in this controversy. He therefore is ineligible as a party.

FINDINGS AND CONCLUSIONS

Judge Leibell found the facts and stated the conclusions of law specifically and separately in his decision. He religiously followed the provision contained in the sentence next to the last of Rule 52 (a), Rules of Civil Procedure:

> "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

Baltimore & O. R.R. Co. v. United States, 3 C. A., 201 F. 2d 795, 798; *Green Valley Creamery Inc. v. United States*, 1 C. A., 108 F. 2d 312, 317; Vol. 5 Moore's Federal Practice, 2nd Ed., p. 2657, and other authorities follow the rule quoted above.

The case was tried upon a Pre-Trial Conference Order which included a stipulation of facts. Judge Leibell could have adopted them instead of specially finding them in his opinion. *Means v. United States*, 30 F. Supp. 68.

CONCLUSION

It is respectfully submitted that upon the facts and law stated herein the decree of Judge Leibell in favor of the plaintiff should be affirmed in all respects.

Respectfully submitted,

ARTHUR E. GARMAIZE,
Attorney for Plaintiff-Appellee.

23215

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. Civ. 49-580

CAPITOL RECORDS, INC.,

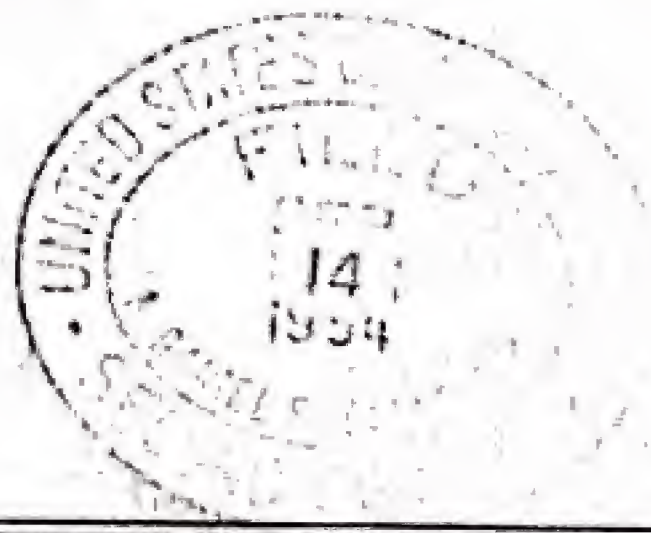
Plaintiff-Appellee,

against

MERCURY RECORD CORPORATION,

Defendant-Appellant.

APPENDIX TO APPELLANT'S BRIEF ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



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Docket Entries.

UNITED STATES DISTRICT COURT

Docket No. 580

Title of Case	*Attorneys*	*Nature of Action*
CAPITOL RECORDS, INC.	ARTHUR E. GARMAIZE. 25 Broad St. (5)	Declaratory Judgment
v.	PAUL J. KERN	
MERCURY RECORD CORPORATION	Times Tower, Times Square (18)	Unfair Competition

Date	*Cash Account—Plaintiff*	*Received*	*Disbursed*
Apr 1 1949	A E G	15	
	Jul 15 1949 Pd. to U. S. Treasy. $15		

Date	*Cash Account—Defendant*	*Received*	*Disbursed*
Jul 24 1953	P. J. K.	5.00	
	Oct 16 1953 Pd. to U. S. Treasy. $5		

Date			*Clerk's Fees*	
Month	*Day*	*Year*	*Filings, Proceedings, Etc.*	*Plaintiff*	*Defendant*
Apr	1	1949	Filed Complaint and Issued Summons	15.—	
Apr	8	1949	Filed Summons and Return. Served John Hammond, V Pres for deft on 4/4 49		
May	5	1949	Filed Answer of Deft PJK.		\
May	13	1949	Filed Stip. & order extend'g time to reply to answer to 5 26 49.— Leibell J		
Jun	1	1949	Filed Stip. & order extend'g time to reply to answer to ten days after determining motion for Summary Judgt., Coxe, J.		\
			Jul 15 1949 Pd. to U. S. Treasy. $15		

Docket Entries.

June 16, 1949	Filed Note of Issue, Motion for Summary Judgt. for pltf.—Ret 6 28 49	V
Sep 20 1949	Filed Affdt. & Notice of Motion for Summary Judgt. for pltf. Denied, etc. (see memo.) Ryan J	V
Sep 20 1949	Filed Affdt. in opp.—Mailed Notice of Entry 10 4 49	V
Oct 3 1949	Filed Order denying Motion for Summary Judgt., Ryan J	V
Oct 4 1949	Filed Copy Order denying Motion for Summary Judgt. with notice of entry	V
Oct 4 1949	Filed Reply to Counterclaim	
Oct. 13, 1950	Filed Note of Issue Motion to renew prior Motion for Summary Judgt. etc.— Ret. 10 24 50	V
Oct 23 1950	Filed Stip. adjourning motion ret. 10 24 50 to 11/10 50.	
Nov 9 1950	Filed Stip. adjourning motion ret. 11/10 50 to 11 24 50.	
Dec 7 1950	Filed Affdt. & Notice of Motion to renew prior Motion for Summary Judgt. for pltf. upon additional facts. Motion denied, etc. (see memo) Noonan J.	V
Dec 7 1950	Filed Affdvt. in opp.	V
Dec 7 1950	Filed Affdvt. in reply	V
Mar 28 1951	Filed Affdvt. for adjournment	
Nov 29 1951	Pre-Trial Before Loibell, J. Adjourned to 1/28 52	
Jan. 22, 1952	Filed Order (request by attys of record) assigning this case to Judge Loibell for disposition, by trial or otherwise, Knox, Ch J. Sent to Judge Loibell, J. Mailed Notice of Entry 1/22 52	

Docket Entries.

Feb 14 1952	Pre-Trial Before Leibell, J. Order to be entered
Mar 18, 1952	Filed pre-trial Order.--Leibell J
" 18 "	Pre-Trial Before Leibell, J. Order signed.
" 18 "	Before Leibell, J.—Trial begun & concluded.- Decision reserved
Sep 26 1952	Filed Opinion $20,107 Decree for pltf. as indicated (Spec. Master be appointed to ascertain amount of pltf's damages and of deft's profits) Leibell, J.
Jun 16 1953	Special pre-trial before Knox, Ch. J. Hearing Held & adjd to 10/28 53
Jun 25 1953	Filed Bill of Costs, taxed at $448.97 (AE36)
Jul 2 1953	Filed Order & Decree for injunction & appointing Thomas F. Reddy, Jr. of 247 Park Ave NYC. Spec. Master to ascertain damages, (Leibell, J.) and that pltf. recover costs & disbursements taxed at $448.97 Mailed Notice of Entry 7 3 53
Jul 3 1953	Mailed Copy of Order appointing Spec. Master to Master
Jul 8 1953	Filed Affdt. & Notice of Motion to review Bill of Costs Ret 7 11 53
Jul 6 1953	Filed Affdt. & Notice of Cross Motion to review taxation of costs Ret 7 11 53.
Jul 15 1953	Memo End on motions filed 7 6 53 & 7 8 53 Granted to extent indicated Settle order Weinfeld, J.

Docket Entries.

Jul	24	1953	Filed Order modifying deft's bill of costs taxed, as indicated. (see order) Weinfeld J. Mailed Notice of Entry 7-27-53.	V
Jul	24	1953	Filed Order denying pltf's. motion to modify costs.—Weinfeld J. Mailed Notice of Entry 7-27-53	V
Jul	24	1953	Filed Notice of Appeal, and on 7-27-53, mailed copy to Arthur Garmaize (PJK)	V
Jul	24	1953	Filed Cost Bond of Appeal.—Hartford Accident & Indemnity Co.	
Oct	28	1953	On call of special pre-trial before Knox, Ch. J.—Hearing adjd to 11/17 53—	

Final Decree.

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

CAPITOL RECORDS, INC.,
Plaintiff.

against

MERCURY RECORD CORPORATION,
Defendant.

Docket No.
Civ. 49-580

This cause was submitted and came on to be tried by the Court without a jury on a pretrial conference order containing stipulations of facts and stipulated exhibits, and counsel having filed their briefs, and the Court having considered the same and made and filed its opinion with findings of fact and conclusions of law on September 26, 1952, and it appearing to the Court that the same show that plaintiff is entitled to judgment in its favor upon the facts and upon the law, it is hereby

ORDERED, ADJUDGED AND DECREED:

(1) That the plaintiff, Capitol Records, Inc., is alone entitled to manufacture and distribute in the United States of America, its territories and possessions, phonograph records made from matrices or their derivatives or duplicates produced from recordings made by Telefunkenplatte, G.m.b.H., of the thirty four musical compositions rendered by the artists hereinafter enumerated, and to the use of the name Telefunken in connection therewith;

(2) That the defendant, Mercury Record Corporation, is not entitled to manufacture or distribute in the United States of America or its territories or possessions any

records made from matrices or their derivatives or duplicates directly or indirectly furnished Mercury Record Corporation by Gramophone Works National Corporation or from matrices, derivatives or duplicates made therefrom by or for Mercury Record Corporation produced from recordings made by Telefunkenplatte, G.m.b.H. of the thirty-four musical compositions rendered by the artists herein named:

5 That the defendant, Mercury Record Corporation, its agents, officers, directors, managers, salesmen, solicitors, employees and servants be and they hereby are forever enjoined from using the said matrices, derivatives and duplicates in the manufacture of records produced therefrom of the said recordings of the said thirty-four musical compositions, namely:

Title of Musical Compositions	*Artists Recording Same*
1. Ouverture Solonnelle "1812" Op. 49 (Overture 1812, Op. 49)	Concertgebouw Orchestra Willem Mengelberg, Cond.
2. Das Kartenspiel (Card Game (Jeux de Cartes)) (The Card Party, Ballet in Three Deals)	Igor Stravinsky conducting the Berlin Philharmonic Orchestra
3. Kaiser-Walzer (Emperor Waltz)	Erna Sack
4. La Folletta (Die Lustige) (La Folletta (The Sprightly Woman))	Erna Sack
5. Parla Walzer	Erna Sack
6. Fruehlingsstimmen Walzer (Voices of Spring)	Erna Sack
7. Mein Herr Marquis	Erna Sack
8. Spiel ich die Unschuld vom Lande (When I Play The Innocent Girl) (I'll Play the Innocent Country Maid)	Erna Sack

	Title of Musical Compositions	*Artists Recording Same*
9.	Ciribiribin	Erna Sack
10.	Einst traumte meiner sel'gen Base (My Late Cousin Once Dreamed)	Erna Sack
11.	Symphonie Nr. IV D-moll (Symphony No. 4 in D. Minor, Op. 120)	German Philharmonic Orchestra of Prague conducted by Josef Keilberth.
12.	Draussen in Sievering blubt schon der Flieder (Out in Sievering where the Lilac Blooms)	Erna Sack
13.	Schenkt man sich Rosen in Tirol (If Roses are Offered in Tyrol)	Erna Sack
14.	Glühwurmchen-Idyll (The Glow Worm)	Erna Sack
15.	Unter dem Lindenbaum (Under the Lime Tree)	Erna Sack
16.	Canzonetta (Anzoletta Sang: Komm mia bella) (Canzonetta)	Erna Sack
17.	Frag' ich mein beklommen herz (Una voce poco fa)	Erna Sack
18.	Auch ich versteh'die feine kunst (Quel guardo il cavaliere)	Erna Sack
19.	Teurer Name, dessen Klang (Caro Nome)	Erna Sack
20.	Den Teuren zu versoehnen	Erna Sack
21.	Ich bin verliebt, ich weiss nicht, wie mir gesch, h (I am in Love)	Erna Sack
22.	Ich hab 'amal a Raenscherl Ghabt (Once I was Tight and Tipsy)	Erna Sack
23.	Heut ist der schoenste Tag in meinem Leben (This is the Finest Day in My Life)	Erna Sack

8

9

	Title of Musical Compositions	*Artists Recording Same*
24.	So verliebt wie heut war ich nie (I was never in Love as Much as Today)	Erna Sack
25.	Niemand liebt dich so wie ich (No One Loves You As I Do)	Erna Sack
26.	An der schoenen blauen Donau (On the Beautiful Blue Danube)	Erna Sack
27.	Gold und Silber (Gold and Silver, Waltz)	Erna Sack
28.	Lachwalzer Laughing Waltz	Erna Sack
29.	Ay, Ay, Ay	Erna Sack
30.	Wenn sich eine schoen Frau verliebt (When A Lovely Lady Falls In Love)	Erna Sack
31.	Schlaf ein, mein Kind schlaf ein (Sleep, my Baby, Sleep)	Erna Sack
32.	Vieni, Vieni	Erna Sack
33.	Dorfschwalben aus Oesterreich (Village Swallows from Austria)	Erich Kleiber conducting Berlin Philharmonic Orchestra
34.	Don Juan	Willem Mengelberg conducting the Amsterdam Concertgebouw Orchestra

and from the use in any form or manner, or in any medium, the name "Telefunken," in connection therewith;

(4) That the defendant, Mercury Record Corporation, pay to the plaintiff, Capitol Records, Inc., the amount of any damages sustained by the plaintiff by reason of the defendant's manufacture and distribution of records of the said thirty four musical compositions.

(5) That the defendant, Mercury Record Corporation, pay to the plaintiff, Capitol Records, Inc., the profits and gains the defendant has derived from the manufacture,

sale and distribution of records of the said thirty-four musical compositions:

(6) That Hon. Thomas F. Reddy, Jr., of 247 Park Ave., N. Y. C., be, and he hereby is, appointed a Special Master to ascertain and report the amount of plaintiff's said damages and of defendant's said profits and gains:

(7) That plaintiff recover its proper costs and disbursements taxed in the sum of Four hundred forty-eight and 97/100 ($448.97) dollars.

(8) That the plaintiff, upon application therefor, based upon the within Decree, may have and be granted, other and further relief as may be necessary, proper and just. 14

Dated, New York, July 1st, 1953.

VINCENT L. LEIBELL,
United States District Judge.

Opinion.

CARROLL RECORDS v. MERCURY RECORD CORP.

Cite as 109 F. Supp. 330

15

[333]

Arthur E. Garmaize, New York City, for plaintiff (Morris Einhorn, New York City, on the brief).

Paul J. Kern, New York City, for defendant (Bernard Colton, New York City, on the brief).

LEIBELL, District Judge.

This is an action for a declaratory judgment under Section 2201 of Title 28 U. S. C. The complaint alleges (paragraph 10 that—

> "* * * there is an actual controversy now existing between the parties involving an agreement respecting the possession and the right to the use of certain matrices for the manufacture of phonograph records from which matrices the defendant is manufacturing phonograph records and is employing unfair methods of competition in the distribution of such phonograph records. * * *"

17

That there is diversity of citizenship and the statutory amount in controversy, and that both plaintiff and defendant are doing business in this district, is alleged in paragraphs 2 and 3. Plaintiff, in addition to a judgment declaring that it—

> "is entitled to the possession and the use in the manufacture and distribution of phonograph records of matrices and their derivatives and duplicates of recording at any time and in any manner made by Telefunkenplatte, G.m.b.H., and to the use of the name in any combination of 'Telefunken' in connection therewith,"

18 also seeks injunctive relief, the impounding of the matrices, derivatives, duplicates and copies, and that defendant be required to pay plaintiff damages and account for the profits of defendant's alleged illegal use of the matrices.

Defendant's answer contains denials and special defenses; also a counterclaim for an injunction, the impounding of plaintiff's matrices, duplicates and copies, for damages and an accounting of plaintiff's profits. After several pretrial hearings the attorneys agreed upon a

stipulation of facts and stipulated as to the admissibility of a number of exhibits. The case was then submitted on the stipulation of facts and the exhibits. The controversy between the parties has arisen because each claims the right to manufacture and sell in this country certain phonograph records produced from matrices of recordings made by foreign artists for Telefunkenplatte, G.m.b.H. (hereinafter called Telefunken) during the Nazi regime in Germany.

After the German Nazis took over control of Czechoslovakia, Telefunken entered into an agreement with Ultraphon Aetien Gesellschaft Fur Grammophon Industrie Und Handel of Prague (hereinafter referred to as Ultraphon) under which Ultraphon was authorized to manufacture phonograph records from certain Telefunken matrices, and sell the records within the territorial borders of Czechoslovakia (Ex. J). When Nazi Germany capitulated at the end of World War II, the property of Germans in Czechoslovakia was seized by the Government. In 1945 Czechoslovakia issued confiscation and nationalization decrees. Supplemental decrees specifically took over the matrices in the possession of Ultraphon which were later transferred to a Czechoslovakian instrumentality known as Gramophone. On November 6, 1947 Gramophone entered into two agreements which made available to Keynote Recordings, Inc. and defendant, Mercury Record Corporation, certain of the matrices of Telefunken recordings, so that the matrices could be used in the United States by defendant for the manufacture and sale of phonograph records.

Plaintiff, Capitol Records, Inc., entered into an agreement (Ex. S) with Telefunken on October 1, 1948, by which plaintiff acquired the right to import certain Telefunken matrices and manufacture therefrom phonograph records for sale in the United States of America and the Western

23 *Opinion.*

Hemisphere. Plaintiff's agreement with Telefunken was executed with the approval of the Joint Export-Import Agency, Berlin [334] Branch, United States Sector, where Telefunken is located.

The above is a general outline of the controversy between the parties. The important details will be selected from the stipulation of facts and the exhibits, and will be hereinafter discussed.

[1] The defendant has raised, in its brief, the absence from the record herein of certain alleged indispensable parties—Telefunken, Gramophone, and the artists who
23 made the recordings for Telefunken. This question—the alleged failure to join indispensable parties, Rule 12(b), Fed. Rules Civ. Proc. 28 U. S. C., was not raised by defendant's answer served April 25, 1949, or by any formal motion; but it was not thereby waived. Rule 12(h).

[2] The artists are not indispensable parties. They assigned all their rights to Telefunken. The arrangement between Telefunken and the singer, instrumentalists, orchestras, bands, conductors and other artists are set forth in paragraphs (h), (i) and (j) of the stipulation of facts herein:

> "(h) Prior to and since 1941, Telefunken, by agreements, engaged singers, instrumentalists, orchestras,
24 bands, conductors and elocutionists and other artists of established reputation to sing, play, conduct and recite for sound recording purposes exclusively for Telefunken and to vest in Telefunken the exclusive right for all time to manufacture, distribute, sell and advertise, and to license the manufacture, distribution, sale and advertising in all parts of the world of phonograph records of such artists' interpretative performances together with the exclusive right to use in con

merce and trade and for advertising purposes the name and photographs of such artists and to license such use.

"(i) Such agreements provide for the payment by Telefunken of varying sums of money as immediate consideration, or in addition to royalties or as annual guarantees upon royalties based upon the number of phonograph records containing the artists' interpretative performances manufactured or sold.

"(j) Telefunken entered into written agreements on dates and with artists as follows. The contracts are what they purport to be:" 25 26

Certain written agreements with the artists are Exhibits A to I of the group of exhibits, the admissibility of which has been stipulated under paragraph 4 of the pretrial order. The contracts with the artist, Erna Sack, (Exs. B, D) contained the provision:

"You [Erna Sack] transfer and assign to us here with, all your copyrights, author's rights and other rights vested in you on basis of your personal appearance for our recording purposes, including in particular the recordings and other mechanical devices made by us, without any restriction and for all countries. This transfer and assignment refers also to all rights which may be newly vested in you in the future, pursuant to any change or amendment of the laws." 27

The contract with Erich Kleiber, General Music Director (Ex. E) contained a similar provision. So did the agreement with Professor William Mengelberg (Ex. G); the agreement with Professor Igor Stravinsky (Ex. H); and the agreement with General Director Joseph Keilberth (Ex. I). [Exhibits A, C and F are unavailable, having been lost during the war.]

28 *Opinion.*

[3] As to Telefunken and Gramophone, I believe they are not indispensable parties. Their rights can be reserved in the decree to be entered herein. Rule 19(b); Marks Music Corp. v. Jerry Vogel Music Co., 2 Cir., 140 F. 2d 268, 270. The judgment to be rendered herein will not under Rule 19(b) "affect the rights or liabilities of absent persons." This in effect was what the old Thirty-Ninth Equity Rule provided. It is discussed at some length in an opinion by Judge Parker of the Fourth Circuit in Oxley v. Sweetland, 94 F. 2d 33.

Before the Federal Rules of Civil Procedure went into effect in September 1938, the courts sought to adjudicate
29 cases in the absence of interested parties who could not be brought in. Mr. Justice Sutherland in Bourdieu v. Pacific Western Oil Co., 299 [325] U. S. 65, 57 S. Ct. 51, 53, 81 L. Ed. 42 (decided November 1936) stated the rule in that respect as follows:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. West v. Randall, Fed. Cas. No. 17,424, 2 Mason 181, 196 (opinion by Mr. Justice Story); Cole Silver Mining Co. v. Virginia & G. H. W. Co., Fed. Cas. No. 2,990, 1 Sawy. 685, 689 (opinion by Mr. Justice Field); Story's Equity Pleadings (8th
> 30 Ed.), [illegible] 77, 96. And see Russell v. Clark's Executors, 7 Cranch 69, 98, 3 L. Ed. 271; Elmendorf v. Taylor, 10 Wheat. 152, 167, 168, 6 L. Ed. 289. Cf. Equity Rule 39.
>
> "We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in."

Grammophone has sought the jurisdiction of this Court by instituting a suit (Civil 58-239 [1]) on May 29, 1950, against Mercury, claiming that Mercury has breached its contract with Grammophone in various ways. In that suit Grammophone seeks damages, an accounting, an injunction and other relief. That suit is still pending. If Grammophone wishes to intervene in the present suit brought by Capitol against Mercury, it may do so. But Grammophone's failure to submit itself to the jurisdiction of this Court in the suit brought by Capitol should not be permitted to tie the hands of the Court so that the plaintiff Capitol may not be accorded legal and equitable relief against Mercury for the latter's unfair competition. If Mercury is committing 32
a tort by competing unfairly with Capitol, Grammophone has made Mercury's conduct possible by entering into a contract with Mercury and authorizing Mercury to do the very thing of which Capitol complains. Grammophone not only authorized it, but made the unfair competition possible by supplying Mercury with the matrices from which the phonograph records were made and sold in competition with Capitol.

As stated by Judge Parker in Oxley v. Sweetland, supra [94 F. 2d 37]:

> "The thing that makes one an indispensable party to a suit is that some interest of his will be affected by it, not that questions of law or fact will be passed upon in which he is interested but by the decision of which 33
> he will not be bound."

In Parker Rust Proof Co. v. Western Union Tel. Co., 2 Cir., 105 F. 2d 976, 979, Judge Swan stated:

> "The doctrine that one whose interests will be affected by a decree must be made a party to the suit

[1] Suit still pending.

34 *Opinion.*

is an equitable doctrine, and a court of equity should not apply it, we think, where special circumstances would make its application inequitable."

In its complaint against Mercury (Civil 58-239) Gramophone alleges:

"Thirty-fifth: On the 23rd day of September, 1949, upon the failure of defendant to cure said breaches and defaults, plaintiff terminated said agreement and demanded that defendant cease to use the said matrices for further production and sale of records and to return same to plaintiff.

35 "Thirty-sixth: In violation of the terms of the agreement defendant continued and still continues to use said matrices without the consent of the plaintiff for the production and sale of records.

"Thirty-seventh: The plaintiff is entitled to an accounting and to an injunction to restrain the defendant from further use of said matrices for the production and sale of any and all records from the said matrices or from reproductions of said matrices."

Thus Gramophone claims that its contract with Mercury is at an end and seeks an injunction against Mercury's further use [336] of the matrices in the production of records and Mercury's sale of records made from said matrices. 36 Therefore any injunction that may be issued against Mercury in the suit brought by Capitol will not adversely affect Gramophone's interests. The injunction can be limited to the use of the matrices by Mercury and the sale of any records made therefrom. It need not provide for the destruction of the matrices or the records. Capitol's claim for damages and an accounting is asserted only against Mercury. Thus the relief which might be accorded by the court to Capitol would not affect any interest of Gramo-

phone but in fact would be in accord with the equitable relief Gramophone seeks against Mercury.

[4] Indeed, Gramophone and Keynote Records (which includes Mercury) by the supplement to their agreement of November 6, 1947 (Ex. Q) recognized the possibility of litigation arising in this country if phonograph records were made from Telefunken matrices which Czechoslovakia had confiscated. They agreed that "Keynote accepts it to be solely their own risk and responsibility to trade with the referred to record- and keep GWXG free from any liability or detriment". This provision can be interpreted as authorizing Keynote (Mercury) to defend any suit that attacked the right of Mercury to use the matrices which might put in issue the rights of Gramophone under the Czechoslovakia Government's decrees. The case of A. L. Smith Iron Co. v. Dickson, 2 Cir., 141 F. 2d 3, would be in point, as showing that under the circumstances Gramophone is not an indispensable party. 38

Paragraph (k) of the stipulation of facts states:

> "(k) Through the years such artists have rendered and recorded their interpretative performances for Telefunken, who engraved such renditions and recordings upon matrices which embody such interpretative performances and which are capable of use and are used in manufacturing phonograph records of such performances." 39

On January 1, 1941, Telefunken entered into an agreement with Ultraphon (par. (l) of the stipulation of facts). The agreement (Ex. J) provided that Telefunken granted Ultraphon representation of certain products including "Records of the brand 'Telefunken'"; not including "products of our (Telefunken's) 'special recordings' department". Paragraph 2 of the agreement provided: "As to

territory, your representation embraces the protectorate Bohemia and Moravia, as well as, until revoked, Slovakia. * * * Exportation of articles subject to representation out of the area of representation is not permitted to you, neither directly nor indirectly".

The representation of Telefunken's interests in the area specified was to be an exclusive one. Paragraph 4 of the agreement provided:—

"You will procure the records enumerated in Par. 1 a. hereof either from us, or will stamp the same yourself from mother matrices or matrices supplied by us. * * *

41

"You will use the mother matrices or matrices resp. supplied to you only for the purpose of stamping records in accordance with Par. 1 a. hereof. A transfer of these mother matrices or matrices resp. to third persons is not permitted to you. The production of matrices from the mother matrices supplied to you, as well as the stamping from the same and from the matrices supplied to you is to be done by you, and at your cost and at your risk."

The Telefunken-Ultraphon agreement, according to paragraph 15 thereof, was to run from January 1, 1941 until December 31, 1950. It extended itself from time to time for periods of two years. The agreement also provides (par. 16) "In case of the termination of this agreement for whatever reason * * * (d) All mother matrices or matrices resp. of records falling within Par. 1 a. (Telefunken brand records) which are in your possession are to be destroyed within 30 days under the supervision of a trustee appointed by us. The raw material resulting therefrom is at our disposal."

42

From the above it appears that Ultraphon did not obtain title to the matrices; [337] that it could not sell or transfer legal title to the matrices to any third person; and that it could manufacture and sell the phonograph records made from the matrices only within the limited territory of Czechoslovakia. If Ultraphon had attempted to permit the matrices to be used in the United States of America by a third party in the manufacture of phonograph records, that would have been a violation of the terms and conditions under which Ultraphon received possession of the matrices from Telefunken. 43

Paragraph (m) of the stipulation of facts states: 44

> "(m) In 1945 the Government of Czechoslovakia issued confiscation and Nationalization decrees embracing the phonograph record industry under which, and implementing decrees, the property in the possession of Ultraphon including the Telefunken matrices in the custody of Ultraphon were seized and transferred to the Czechoslovakian instrumentality formed for that purpose, namely, Gramophone Works National Corporation, hereinafter called Gramophone, translations whereof are annexed hereto as Exhibits K to P."

The Czechoslovakian decree of October 25, 1945 (No. 108) confiscated without compensation the property of the persons mentioned in Section 7, subdivision 1b, of the Nationalization decree of October 24, 1945 (No. 100). Said Section 7 provided (Ex. K): 45

> "Subd. 1. For nationalized property which at the time of actual termination of enemy occupation and of the Nazi or Fascist regime undoubtedly belonged, or still belongs to persons mentioned below, no compensation is Paid:

"(a) To the German Reich, the Kingdom of Hungary, to public bodies * * *.

"(b) To persons of German or Hungarian nationality, with the exception of those who can prove that they have remained loyal to the Czechoslovak Republic, have never committed offences against the Czech and Slovak nations, and have either actively participated in the fight for the liberation of the Republic or suffered under Nazi or Fascist terror."

Acting under the Decree of October 24, 1945, (No. 100) the Minister of Industry on December 27, 1945, decreed
47 (Ex. L)—in respect to Telefunken's property in Czechoslovakia—

"* * * that the enterprise Telefunken fuer drahtlose Telegraphie G.m.b.H. with the seat in Berlin as to enterprises situated within the boundaries of the Czechoslovak Republic be nationalized on October 27, 1945 by becoming State owned, because it is an enterprise for manufacture of records according to sec. 1, par. 1, No. 27 of the said Decree.

"Through this nationalization, the Czechoslovak State acquires the ownership of the nationalized enterprise to wit: of all real property, buildings and installments serving the operation of the nationalized enter-
48 prise, all accessories of the enterprise including all rights (patents, licenses, franchises, trade marks, samples, etc., notes, securities, deposit books cash and outstanding assets belonging to the enterprise, all finished and unfinished goods, semi-manufactures, stocks and materials which belonged to the enterprise on the day when this decree comes into force. Places of deposit of raw material, personal property and rights permanently serving the operation of the enterprise are affected by the nationalization, even if they

belong to persons other than the owner of the enterprise."

On December 27, 1945, the Minister issued an Industry edict or decree (No. 925) (Ex. M1—in respect to Ultraphon's property in Czechoslovakia—

"* * * that the enterprise known as 'Ultraphone Stock Company for Gramophone Industry and Trade' with the seat in Prague was nationalized by becoming State owned as of October 27, 1945, because it is an enterprise for the manufacture of gramophone records [338] pursuant to sec. 1 subd. 1, No. 27 of the said Decree. 50

"Through this nationalization, the Czechoslovak State acquires the ownership of the nationalized enterprise to wit: of all real property, buildings and installations serving the operation of the nationalized enterprise, all its accessories, including rights (patents, licenses, franchises, trade marks, samples, etc.), notes, securities, deposit books, cash and outstanding assets belonging to the enterprise, all finished and unfinished goods, semi-manufactures, stocks and materials which belong to the enterprise on the day when this decree comes into force. Places of deposits of raw materials, personal property and rights permanently serving the operation of the enterprise are affected by the nationalization, even if they belong to persons other than the owner of the enterprise." 51

On March 7, 1946 (see Ex. N) the Minister of Industry together with the Minister of Finance, acting under the Nationalization decree of October 24, 1945 (No. 100) issued an edict or decree (No. 1251) and established the firm of "Gramophone Works, National Enterprise" and transferred to Gramophone various properties, including

"3. The properties of the enterprise Telefunken Drahtlose Telegraphie G.m.b.H. with the seat in Berlin to the extent of its nationalization.

"4. The properties of the enterprise Ultraphon, akciova spolecnost pro prumysl a obchod gramofony, with the seat in Prague to the extent of its nationalization."

A further decree (Ex. O) was signed by the Minister of Industry on November 27, 1948 (implementing various prior decrees) which formally declared that the enterprise—

"Telefunkenplatte G.m.b.H., Berlin be nationalized,
53 as far as its property and furnishings are located within the Czechoslovak Republic, because it is an enterprise which forms together with the nationalized enterprise an economical entity and is decisively controlled by the nationalized enterprise pursuant to Subd. 5, of the said Section."

Finally on November 29, 1948, the Minister of Industry, together with the Minister of Finance, decreed (Ex. P) that the property of the nationalized enterprise "Telefunkenplatte G.m.b.H., Berlin to the extent of its nationalization" be embodied into Gramophone Works, National Enterprise, as of January 1, 1946, and that Gramophone take over the obligations of Telefunkenplatte as of January 1, 1946.

54 From the above decrees it appears that the Czechoslovakian government has confiscated and taken over, has nationalized and embodied in Gramophone, as of January 1, 1946, all of the properties of Telefunken and Ultraphon within the jurisdiction of the Czechoslovakian government. The original decrees of October and December 1945 (Exs. K, L and M) and the implementing decrees of March 1946 and November 1948 (Exs. N and P) were very broad. Within the scope of the decrees were the Telefunken matrices of Mercury involved in this litigation.

[5, 6] The confiscation of the circular metal discs, known as matrices, did not invest the Czechoslovakian government with the right to reproduce records from the matrices and distribute them beyond the Czechoslovakian borders, or to license others situated beyond the Czechoslovakian borders to reproduce records from the said matrices loaned to them for that purpose. The Gramophone Company when it obtained physical possession of the matrices, originally "loaned" to Ultraphon, acquired no more than a property right in the matrices themselves. Of course, Czechoslovakia, as a Sovereign, could through its instrumentality, Gramophone, manufacture records from the matrices in Czechoslovakia and distribute them within its own territory. Its 56
own courts would recognize and enforce that right. But the courts of another nation would not have to recognize any such claimed right because the possession of the matrix did not carry with it the right to the performance, which was with Telefunken in Berlin. The right to reproduce the performances engraved on [3339] the matrices was intangible and its situs was at the domicile of its owner, Telefunken, in Berlin.

An analogy can be found in an early case, Stephens v. Cady, 14 How. 528, 55 U. S. 528, 14 L. Ed. 528, involving the right to a copyright. In that case the Supreme Court distinguished between the tangible property in an engraved copper plate and the intangible right to make and publish the map engraved on the face of the plate. The facts were 57
these: a judgment at law had been recovered against the plaintiff, Stephens, upon which an execution had issued. A copper plate engraving of a map on which plaintiff had acquired a copyright was sold to the defendant Cady pursuant to execution on the judgment. Having become the legal owner of the property in the plate, the defendant Cady claimed the right to print and publish the maps and was so engaged when plaintiff Stephens sued for an injunction

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barring defendant from pursuing such a practice. The Court characterized the right to print and publish the map as "incorporeal", and declared the plate to be nothing more than the means by which copies of the map were multiplied. It emphatically rejected the proposition that "the right to print and publish the copies adheres to and passes with the means by which there are produced * * *." Shortly thereafter in the related case of Stevens (Stephens) v. Gladding, 17 How. 447, 58 U. S. 447, 15 L. Ed. 155, the court reiterated its holding in the earlier case and concluded that "the incorporeal right (as represented by the copyright) subsists wholly separate from and independent of
59 the plate", and that the sale of the copper plate of the map did not carry with it the right to print maps therefrom. The doctrine of those two cases has been consistently followed.

In Ager v. Murray, 105 U. S. 126, 26 L. Ed. 942, the court held that if equity had jurisdiction of the person owning the intangible right it could deal with the situation and order a transfer of the right, such as a right to a patent. In American Tobacco Co. v. Werckmeister, 207 U. S. 284 at page 299, 28 S. Ct. 72, 77, 52 L. Ed. 208, the court recognized "the separate ownership of the right of copying from that which inheres in the mere physical control of the thing itself". See also, Bobbs-Merrill Co. v. Straus, 210 U. S. 339 at page 347, 28 S. Ct. 722, 52 L. Ed. 1086.

60 The parties have stipulated:

> "(1) Telefunken and Ultraphon Aetien Gesellschaft Fur Grammophon Industrie Und Handel of Prague, prior to the issuance of the Nationalization and Confiscation Decrees in 1945, had not terminated their agreement entered into in 1911."

Paragraph (m) of the stipulation of facts states:

"(m) On November 6, 1947 Gramophone entered into two agreements with Keynote Recordings, Inc. and with the defendant making available to the defendant the seized Telefunken matrices for the manufacture and sale of phonograph records therefrom by the defendant in the United States. Copies of said contracts are annexed hereto as Exhibit Q."

The said agreement (Ex. Q) provided:

"3 GWNC shall from time to time upon Keynote's request loan recording matrices specified by Keynote, of which during the period of this agreement will be or have already been produced records by GWNC, the referred to matrices of which have been as property of enemy firms situated on the territory of Czechoslovakia nationalized by decree of the President of the Republic of October 24th, 1945 collection of laws and regulations No. 100 15 and by the edicts of the minister of industry No. 923 and No. 1251, both published in the official gazette of 1946." 62

"5. Should any matrices loaned to Keynote become worn, defective or damaged, GWNC shall, if requested by Keynote, replace same and in such event the worn, defective or damaged matrice shall be returned to GWNC by Keynote. If during the period of these agreements Keynote withdraws from its catalogues records pressed [310] from matrices loaned hereunder Keynote shall return to GWNC the relative matrices. At the termination of this agreement whether by effluxion of time or otherwise Keynote shall return to GWNC all matrices loaned to Keynote and still existing such return to be effected within thirty days of termination." 63

"12a. Keynote shall sell records pressed from matrices loaned under this agreement under trade marks 'Supraphon', 'Ultraphon' and 'Esta' or under their own trade marks in compliance with the conditions under clause of this agreement: * * *

d. Keynote hereby acknowledges the validity of the Supraphon, Ultraphon & Esta trade marks and the exclusive ownership of it by GWXC' and shall not now or hereafter lay claim to any rights, other than the rights of license, herein granted to the mentioned trade marks."

"20. Keynote shall not assign or license the benefits 65 of this agreement to any person, firm or corporation without the consent in writing of GWXC', but GWXC' got advised and have knowledge of the fact, that Mercury Record Inc., 830 South Wabash Avenue, Chicago/ Illinois, USA, are associated with Keynote.

"21. After establishing validity of this contract it should continue for a period of at least two years, i.e. till December 31st 1949 and Keynote shall have the option to renew for a period of other two years on the same terms, by notice given at least 60 days before the expiration of the period of this contract."

Said agreement (Ex. Q) was supplemented on the same day by a further short agreement (part of Ex. Q) which 66 provided:

"With reference to clause 3 of the contract between GWXC' and Keynote according to which matrices will be loaned by GWXC' to Keynote which fall among the category of nationalized resp. confiscated property of former enemy owners, GWXC' indicated the title deeds of their right commercially to utilize these matrices as based on the decree of the President of the Republic

No. 100/45 collection of laws and regulations of October 24th, 1945 and the edicts of the Minister of Industry No. 923 and 1251, both published in the official gazette of 1946.

"Keynote on their part undertake and bind themselves to guarantee for the purposes of representation the commercial interest of GWNC, consisting in the production of records from GWNC' matrices and the sale of records pressed from such matrices or the sale of imported gramophone records, for all possibly accruing legal sequences and eventualities, particularly the case of litigation by actions for damages, infringement of copyright laws or royalties in USA, supposing 68
that any suiters and claimants to presumptive rights in respect to these matrices should raise claims in USA, may such claims now arise from authors, artists, record producers or patentholders, which according to Czechoslovak statutes & laws would be void of force and relevancy: Keynote accepts it to be solely their own risk and responsibility to trade with the referred to records and keep GWNC free from any liability or detriment."

Paragraph (s) of the stipulation of facts states that Gramophone terminated its agreement with defendant, including Keynote Recordings, Inc., on August 18, 1949. The present action was instituted by Capitol Records, Inc. by the filing of the complaint in the Clerk's Office on April 1, 1949. On May 29, 1950, Gramophone filed a complaint (Ex. R) in this Court against Mercury claiming about $120,000, seeking also an accounting and an injunction. Mercury answered (Ex. R) the Gramophone suit and pleaded various counterclaims, totalling $133,000 in damages. 69

The stipulation of facts herein further states in paragraph (o) that

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"(c) On October 1, 1948 the plaintiff entered into an agreement with Telefunken in Berlin under which and upon payments therein specified, plaintiff [341] acquired the right to import from Telefunken of Berlin its matrices and to manufacture and sell phonograph records therefrom in the United States and Western Hemisphere containing the artistic interpretative performances recorded and rendered by Telefunken artists. Photostat of said contract is annexed hereto as Exhibit S."

71 The contract between Capitol Records, Inc. and Telefunkenplatte, G.m.b.H. contains recitals that the companies are respectively engaged directly or through subsidiary corporations in the recording, manufacture and distribution of phonograph records and that "the Companies desire to enter into this contract for the primary purpose of exchanging matrices and making matrices available to each other for their use".

The said agreement (Ex. S) provided that its initial period shall be for five years from October 1, 1948, subject to renewal from year to year upon mutual consent. Paragraph 1 thereof provides:

"In the event of termination of this agreement, the Companies shall be relieved from any further obligation to exchange matrices hereunder. Within thirty (30) days of the said termination of this agreement, all matrices received hereunder shall be returned to the Company originally supplying the same, or its successor, or, in the alternative, shall be destroyed and all duplicates thereof or matrices made therefrom shall be destroyed. The rights granted hereunder to distribute records, however, shall continue as to all records manufactured pursuant to this agreement prior to such termination date subject to the obligation to make the

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regular quarterly accountings and payments in connection therewith as herein provided with respect to records manufactured pursuant to this agreement.

* * * * * *

"B. The term 'matrix' as used in this agreement is defined to mean a positive or a negative of an original recording from which records in commercial quantities can be produced, directly or indirectly."

The contract between Telefunken and Capitol also provided:

"V. Each Company grants to the other the right 74
exclusive except as to itself only to process and manufacture records from matrices which it (the former) has or may have available for exchange hereunder in the respective Territories above named, and in said Territories only, and each Company grants to the other the non-exclusive right to distribute records made from matrices which it (the former) has or may have available for exchange hereunder."

"VI. Each Company shall pay to the other the amount of artists' royalties, if any, on all records manufactured or distributed by such Company or any of its subsidiaries from matrices delivered to it by the other, at rates and otherwise in accordance with the respective artist's contract (to the extent that such 75
Company has been notified and informed thereof) with the Company which recorded the matrix. Each Company shall also pay to the other the amount of any other fees and payments which are now or which hereafter may be required with respect to such records by reason of contract of the other Company with a musician's union or by other contracts to the extent that such Company has been notified and informed thereof."

"XIII. Each Company shall account to the other and to the Joint Export-Import Agency on a quarterly basis for all fees, artists' royalties and any and all other sums which may become due and payable from that Company to the other under the terms of this agreement. The said quarterly accounting periods shall end on the last day of March, June, September and December in each year. Within thirty (30) days after the termination of each such accounting period, each Company shall transmit to the other and to the Joint Export-Import Agency a full and detailed accounting for the period just completed. Upon the rendering of such an accounting, the payment thereof
77 [342] shall be made forthwith in United States dollars in such manner as shall be approved by the Joint Export-Import Agency."

As to trade marks and trade names, the agreement (Ex. S) provided:

"XVI. * * * The German Company hereby gives and grants to the American Company a license, exclusive except as to itself only, to use the insignia, trade name, and trade mark of the German Company in the American Territory on records manufactured by the American Company or on its behalf from matrices supplied to it by the German Company hereunder, to the extent
78 that the German Company has the right to give and grant such a license as to such Territory."

Paragraph XXIV provided:

"XXIV. This agreement is subject to the approval of the Joint Export Import Agency."

Under paragraph XXVI it was expressly agreed that the validity of the agreement and all matters relating to the

interpretation and performance thereof should be determined by the laws of the State of New York.

A list of the thirty-four Telefunken records is set forth on three pages of Exhibit X.

In relation to Exhibit X the parties have stipulated:

> "(bbb) The statement annexed as Exhibit X, consisting of three pages, enumerates the recordings initially and originally rendered for Telefunken by artists therein named on the respective dates therein shown, of which as therein indicated, plaintiff and defendant are manufacturing and selling phonograph records and of which as therein also indicated, plaintiff 80
> has not yet but defendant has already, manufactured and sold phonograph records, and constitutes the basis for proof of damages for each party as of the date of the pretrial conference."

By their stipulation of facts the parties have expressly eliminated from this suit the copyright status of the works recorded [par. (pp)]. Neither party claims ownership under copyright law or otherwise of the works recorded on the phonograph records involved [par. (qq)]. The validity of and plaintiff's right to use the name, trade name and trade marks of Telefunken are not in issue; and plaintiff concedes that defendant did not use or authorize the use of said name, trade name or trade marks [par. (rr)].

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Although the parties have stipulated, "that while Germany was governed by the Nazi regime, recordings by non-Aryan artists were prohibited and the sale of records by Aryan artists had to be approved by the Nazi regime", that would not put the recordings made by the Aryan artists in the class of property beyond the protection of the law in this country. As much as we may deplore such intolerant and oppressive practices imposed on a German

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industry by the edicts of the Nazi Government, our own public policy would not oblige us to disregard all questions relating to the claimed rights of these litigants to use the matrices in the manufacture of phonograph records, or render whatever rights they may have respectively acquired by contract unenforceable. Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N. Y. 474, 479, 14 N. E. 2d 798. Indeed the contract between plaintiff and Telefunken (Ex. S) bears the official stamp of the "Joint Export-Import Agency—Berlin Office (American Sector)" and is stamped "Approved". "An export license will be issued upon receipt of notice that payment has been arranged in accordance
83 with contract terms". We have the right to assume that the Joint Export-Import Agency, in the American Sector of Berlin where the main office of Telefunken has always been located, knew as much about the Nazi non-Aryan proscriptions as we do. Further, it seems to have been the policy of our Government to assist in the re-establishment of the business and industry of Western Germany, and it was to the interest of our Government to do so.

The Joint Export-Import Agency was established by an agreement dated December 2, 1946, between the United Kingdom and the United States in New York, N. Y. 61 [343] U. S. Stat. 2475. It was a formal agreement implementing the offer of the United States Secretary of State to agree to an economic fusion of the American
84 Occupation Zone with the Occupation Zone of any other nation willing to cooperate with the American Military Government in bringing about the economic unity of Germany.

The Agency controlled the foreign trade of those parts of Germany occupied by the United States and the United Kingdom. On the export side, it approved all proposals to export goods from Germany and determined the countries to which exports should go, the prices at which they

should be sold, and other conditions relating to export contracts such as the period and place of delivery and the currency of payment.

Applications for permission to export were received from German exporters. When it was decided that the export should be allowed, following advice from the local Land Economic Ministry, and that payment would be made in an appropriate manner, an export license was issued.

By an amendment to the Agreement, dated December 17, 1947, the United States was given a larger say in the Agency, as a result of an increase in our monetary contribution toward the functioning of that Agency. [Monthly Report of the Control Commission for Germany (British Element)—April 1948 p. 18.] 86

The Export-Import Agency was responsible for organizing the whole of the external trade of the Joint British American Zone. It was the aim of the two governments that their liability to pay for imports into Germany should cease at the end of 1949 and that after that date the British and American Zones should together form a self-sustaining economy, capable of producing sufficient exports to pay for necessary imports. It was also the aim of both governments eventually to obtain from the proceeds of German exports some of the cost of the occupation of Germany. The development of German exports to this extent was a major undertaking. [Monthly Report of the Control Commission for Germany (British Element) March 1947.] 87

The parties have stipulated:

> "(y) It is common knowledge and the Court is asked to take judicial notice thereof, that the state of war between the United States and the Government of Germany was terminated by Joint Resolution of the 82d Congress, 1st Session, approved October 19, 1951 (H. J. Res. 289) and that trade between citizens of the

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United States and subjects of Germany was permitted since on and before March 4, 1947 by the Foreign Funds Control of the Treasury Department by amendment to general license number 94 on said date."

This paragraph should be read with paragraph (g) of the stipulation which states:

"(g) The office and domicile of Telefunken in Berlin was located in the United States Sector when that City was divided into Sectors and the export operations of Telefunken are under the supervision of the Joint Export-Import Agency, Berlin Branch, United States
89 Sector."

[7] The parties have also stipulated [par. (w)] that while Czechoslovakia was overrun by the Nazi regime of Germany, the government in exile of Czechoslovakia declared war on Germany on December 16, 1941; that about April 1945, that government returned to Prague and that our government recognized the government of Czechoslovakia before and after its territory was overrun by the Nazi regime of Germany [par. (x)]. The stipulation also states [par. (v)] that the government of Czechoslovakia has been under the rule of a Communistic regime officially since February 25, 1948. I do not see how those facts as to the various governments of Czechoslovakia have any-
90 thing to do with the decision of the issues in this case. The Communistic regime now in control of the government of Czechoslovakia has been recognized by the United States, at least to this extent that the two governments maintain diplomatic relations. We may disapprove and abhor many of the things the present government of Czechoslovakia has done and reject communism and all its works, but that has nothing to do with the [311] issues in this case. The manner in which the decrees or edicts were made or issued

may not be our idea of enacting legislation, but if that is the way they do those things under their form of government, we give it effect in our courts. Eastern States Petroleum Co., Inc. v. Asiatic Petroleum Corp. D. C. S. D. N. Y. 1939, 28 F. Supp. 279; Banco De Espana v. Federal Reserve Bank, D. C. S. D. N. Y. 1939, 28 F. Supp. 958, affirmed 2 Cir., 114 F. 2d 438, and cases cited therein.

[8] An important question presented is this: What rights did the Government of Czechoslovakia acquire under its confiscation decrees? It acquired title to the res, the thing called a matrix. It could control the use of the matrix in the reproduction of records in Czechoslovakia, and de- 92
rive revenue therefrom and prevent any one from bringing into Czechoslovakia from Germany a duplicate matrix and using it to manufacture records in Czechoslovakia. It could bar the importation into Czechoslovakia of phonograph records made from the matrix in Germany. All this Czechoslovakia could do as a Sovereign, so as to give the matrix it had confiscated a monopoly value within its own territory. It did not have to pay anything for the privilege of doing so either as royalties to the artists who had made the recordings for Telefunken or as payments to Telefunken under the Ultraphon contract.

But once Czechoslovakia through its national agent Gramophone attempted to extend it self-created monopoly beyond its borders and to exercise its right to produce 93
phonograph records from the matrices in foreign countries, it was open to a challenge from either Telefunken or from anyone claiming to exercise Telefunken's right to produce phonograph records from a Telefunken matrix. Unless the provisions of a treaty made by Czechoslovakia with Germany or of a treaty to which the United States was a party gave Czechoslovakia the right to use the matrix in the United States to manufacture phonograph records, Czechoslovakia could not give itself that right and have it recognized in the courts of the United States.

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[9] Defendant's attorney argues that since the seizure of German property within the territory of Czechoslovakia was recognized by the United States and the other signatories to the Treaty of Paris on January 21, 1946, Czechoslovakia could use the seized Telefunken matrices to manufacture records in this country. The Paris treaty contained a provision that:

> "Each signatory government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manner designed to preclude their return to German ownership or control. * * *"

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["Agreement on Reparations from Germany etc. U. S. Dept. of State, Treaties and other International Acts, Series No. 1655. Dept. of State Bulletin, Vol. XIV, No. 343, January 27, 1946, at p. 114."]

There were eighteen signatories to the treaty of Paris. The United States of America and Czechoslovakia signed the treaty. An adjunct to the treaty of Paris (an agreement relating to the resolution of conflicting claims to German enemy assets) which is printed in "The Department of State Bulletin" Vol. XVIII, No. 444, Jan. 4, 1948, contains at p. 12, the following article No. 29:

> "The assertion of custodian control over a German enemy interest in property within the territory of one party shall not be deemed to have destroyed the German enemy interest in property within the territory of another party."

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If we apply this quotation to the facts in this case the Czechoslovakia seizure of the matrices of Telefunken in Czechoslovakia could not destroy the rights which the Military Control Council had over assets of Telefunken within

the sector of Berlin which was under the control of the United States Military. No signatory to the treaty of Paris could assert through certain German enemy assets it may have seized, any additional rights which were part of the German enemy assets within the territory controlled by the Joint Military Control Council. None of those rights were expressly given up by the treaty of Paris and in fact they were impliedly reserved by the later adjunct to the treaty, an agreement [345] relating to the resolution of conflicting claims to German enemy assets.

The plaintiff's attorney states that the basic question of law in this case is this:

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> "May the Government of Czechoslovakia or any government, during peace or war, by law, edict, decree or fiat, affect title beyond its territorial borders to intangible property rights of which the situs is outside its territorial borders?"

He argues that

> "The status of title in Czechoslovakia as a result of the seizure is irrelevant here. The status of title outside of Czechoslovakia of the physical matrices seized is also irrelevant because the possessor is circumscribed in their commercial use by reason of lack of title to the more highly valuable incorporeal interpretative performances engraved upon them which were never vested in Ultraphon and were never located in Czechoslovakia and were not within the power of that government to seize, the situs of these intangible interpretative performances having always been in Berlin, Germany."

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[10, 11] The recordings on the matrices represented the performances of the artists. The law of Germany (Ex. V), Czechoslovakia (Ex. W) and New York, as expressed in its

decided cases, all recognize artistic performances as property. All rights of the artists were assigned to Telefunken (Exs. A to I inclusive). The artists agreed to make the recordings solely for Telefunken and not for any others. The artists received payments for the recordings and assignment of their rights, including royalties on the retail sales of phonograph records made from the matrices of their recordings. Telefunken for its part recorded the performances of the artists, manufactured the matrices, made the phonograph records therefrom either itself or through licensees accompanied by a loan of the matrices to corporations in other countries. It advertised the work
101 of the artists and in most instances applied the Telefunken trade-mark to the phonograph records. The work of the artists, the rights Telefunken acquired from the artists constituted property rights of Telefunken (something distinct from the metal matrices) a valuable property right, which will be protected from unfair competition by one who misappropriated that property.

In Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N. Y. S. 2d 183, Id., 279 App. Div. 632, 107 N. Y. S. 2d 795, the defendant had pirated and recorded a contracted broadcast and was enjoined because it had taken property rights of commercial value. Metropolitan had given to Columbia Records the exclusive privilege of making and selling records of its
102 performances. A preliminary injunction, restraining the defendants from recording and selling musical performances of plaintiff was granted. In the Metropolitan Opera case Judge Greenberg stated that unfair competition was not limited, as of old, to a "palming off" of goods of the seller as those of another; that the doctrine of unfair competition had been extended to the "granting of relief in cases where there was no fraud on the public, but only a misappropriation for the commercial advantage of one person of a benefit or 'property right' belonging to another."

[101 N. Y. S. 2d 489.] (See the cases cited therein to support this statement.)

The decision of the United States Court of Appeals, Second Circuit, in RCA Mfg. Co. v. Whiteman, 114 F. 2d 86, 88, is not to the contrary. The meat of the decision in the Whiteman case was that "the records themselves could not be clogged with a servitude" which limited the use of the records "for non-commercial use on phonographs in homes". The court held that "Restrictions upon the uses of chattels once absolutely sold are at least prima facie invalid; they must be justified for some exceptional reason, normally they are 'repugnant' to the transfer of title."

In the RCA Mfg. Co. v. Whiteman case the appellate court stated: 104

"It is only in comparatively recent times that a virtuoso, conductor, actor, lecturer, or preacher could have any interest in the reproduction of his performance. Until the phonographic record [3401] made possible the preservation and reproduction of sound, all audible renditions were of necessity fugitive and transitory; once uttered they died; the nearest approach to their reproduction was mimicry. Of late, however, the power to reproduce the exact quality and sequence of sounds has become possible, and the right to do so, exceedingly valuable; people easily distinguish, or think they distinguish, the rendition of the same score or the same text by their favorites, and they will pay large sums to hear them. Hence this action. It was settled at least a century ago that the monopoly of the right to reproduce the compositions of any author his 'common law property' in them was not limited to words; pictures were included. Turner v. Robinson, 10 Ir. Ch. 121; S. C. 10 Ir. Ch. 522; Prince Albert v. Strange, 1 McN. & G. 25. This right has at times been stated as 105

though it extended to all productions demanding 'intellectual' effort; and for the purposes of this case we shall assume that it covers the performances of an orchestra conductor, and—what is far more doubtful—the skill and art by which a phonographic record maker makes possible the proper recording of those performances upon a disc. It would follow from this that, if a conductor played over the radio, and if his performance was not an abandonment of his rights, it would be unlawful without his consent to record it as it was received from a receiving set and to use the record."

107 The last sentence of this quotation is pertinent.

[12, 13] In the case at bar we have the physical reproduction in this Country by Gramophone's licensee, Mercury, of the recording on the Telefunken matrix. The matrix was only loaned to Ultraphon to make phonograph records for sale within Czechoslovakia. This case does not involve any servitude on an article made to be sold at retail. No public policy requires the removing of the territorial limitations placed on the use of the matrix. Defendant argues that there is no showing as to how the matrices got into Czechoslovakia. The presumption is that they got there under the provisions of Telefunken's contract with Ultraphon. Any other assumption would be a mere speculation.

108 [14] The copying or reproduction of a phonograph record would be unfair competition. RCA Mfg. Co. v. Whiteman, supra. The same principle should be applied as was enforced in respect to the perforated paper rolls, used to reproduce a musical composition mechanically on a piano. Pirating the perforated music roll, made by another, was held to be unfair competition in Aeolian Co. v. Royal Music Roll Co., D. C., 196 F. 926, and an injunction was granted the complainant.

The case of Ricordi & Co. v. Haendler, 2 Cir., 194 F. 2d 914, 915, did not establish any principle that could be used to support the proposition that duplicating a phonograph record of a competitor is not unfair competition. The appellate court (Second Circuit) in the Ricordi case held that the question before it was "one of federal law": i.e. Did the plaintiff preserve any rights after publication in the book except those granted by the copyright? The court held that after plaintiff's copyright had expired the public "might reproduce the book without any limitation" and could reproduce it photographically. The court stated also that "we have great doubt that the court which decided Dutton [& Co.] v. Cupples [117 App. Div. 172, 102 N. Y. S. 301], would have found enough distinctive in the plaintiff's [Ricordi's] typography to sustain a claim of 'unfair competition' based upon photographing it"; and noted that plaintiff's books in the Dutton case were "profusely illustrated with illuminated capitals and type adapted from that used in ancient missals as well as by pictures in colors, some originally prepared by plaintiff's artists and some being copies of well-known paintings." The court in the Ricordi case stated that "It would be a far cry from a book so embellished to the plaintiff's book". 110

The recording of each artist for Telefunken produced a matrix that in the realm of music was as highly embellished and [347] illuminated by the talent of the artist and was as distinctively the creative work of the artist as were the books of Dutton, and is entitled to equal protection against unfair competition. The Ricordi case has no application to the case at bar. The Dutton case supports plaintiff's contentions. There is no claim in this case by either side that the Copyright Law has any application. 111

Defendant cites several cases which are distinguishable from the case at bar. They did not involve any duplication of a competitor's phonograph records. In Supreme Rec-

ords, Inc. v. Decca Records Inc., D. C., 90 F. Supp. 904, the litigants had each made a separate recording of the same song and sold phonograph records thereof with the permission of the author. The only similarity was that the same musical composition was recorded. But the recordings were made by different artists. The court denied an injunction

In Shapiro, Bernstein & Co. v. Miracle Record Co., D. C., 91 F. Supp. 473, the issue was one of the alleged copyright infringement. The court held there was no copyright and no infringement. Duplication of phonograph records of a recording made by an artist was not involved. Monkton v.
113 Gramophone Co., 106 L. T. Rep. 84, and Musical Performers Protection Ass'n v. British International Pictures, Ltd., 46 T. L. Rep. 485, involved the English copyright statutes. However, in the latter case it was held that the making of a phonograph record of a performance without the consent of the performer was illegal. That was also a holding of RCA Mfg. Co. v. Whiteman, supra.

Beecham v. London Gramophone Corp., Sup., 101 N. Y. S. 2d 473, held that British Lion Production Assets Ltd., which had made the sound track for the motion picture "Tales of Hoffman", acquired from Sir Thomas Beecham and Anglo-American Music Assoc., under the special provisions of its contract, the right to assign or dispose in whole or in part of the products of Sir Thomas' services; and that
114 the British Lion Productions Assets Ltd. had not acted wrongfully by assigning to London Decca the right to manufacture records from the sound track of the motion picture. No preliminary injunction was granted, even though Beecham and the Royal Philharmonic Orchestra, at the time the recordings were made for the sound track, were under exclusive contract in the United States to make recordings for Columbia Records Inc. The court found that

there had been no showing of any wrongful misappropriation of the property right of another, to justify the issuance of a preliminary injunction.

The case of Shostakovich v. 20th Century Fox, 196 Misc. 67, 80 N. Y. S. 2d 575, 579, did not involve the issues here presented. The plaintiff artists in the Shostakovich case objected to the use of their music and names in an anti Soviet film. They were citizens of the Soviet Union. In that case the Doctrine of Moral Right and the New York State Civil Rights Law were urged by plaintiff. The plaintiff's works were in the public domain. Although the court stated that under the Doctrine of Moral Right, it could in a proper case, prevent the use of a composition or work in the 116
public domain in such a manner as would be violative of the author's rights, it found no basis in the facts presented for granting the drastic relief of an injunction, "in the absence of any clear showing of the infliction of a wilful injury or of any invasion of a moral right".

[15] In a prior part of this opinion I have discussed the question of title to the performances and the right to reproduce the records in America. Plaintiff has that title and right. The dates of production might have some bearing on the question of damages if plaintiff had stood by and done nothing to stop defendant from violating plaintiff's rights. H. A. Metz Laboratories, Inc. v. American Pharmaceutical Co. Inc., D. C. S. D. N. Y. 1936, 18 F. Supp. 398, affirmed Winthrop Chemical Co. v. American Pharmaceutical 117
Co., 2 Cir., 93 F. 2d 587. But plaintiff was not guilty of laches. The parties have stipulated (par. (d)) that "Plaintiff gave notice of the matters alleged in the complaint before commencing the within action". The action was commenced by the filing of the complaint in the Clerk's Office on April 1, 1949. Defendant, Mercury's [348] earliest release date for any of its records is May 1, 1949, when it released

fourteen of the records. On July 1, 1949 Mercury released another record; on August 1, 1949, eight more records; on April 1, 1950 an additional nine; a record on July 1 and one on October 2, 1950. Mercury deliberately disregarded both plaintiff's notice and the filing of the suit and went right ahead producing records from matrices which it had received under its contract with Gramophone. The parties have stipulated (Par. 8) that "Gramophone Works National Corporation terminated its agreement with defendant (Mercury) including Keystone Recordings, Inc. on August 18, 1949", perhaps September 23, 1950, is the correct date.

119 As hereinabove stated, Gramophone on May 29, 1950, brought suit in this court against Mercury for breach of the contract of November 6, 1947 (modified the same date), charging that Mercury failed to account to Gramophone for the total number of records produced and sold by Mercury and failed to pay Gramophone all the royalties due it (alleged to be $21,504.57); that Mercury agreed to purchase certain records manufactured by Gramophone and shipped to Mercury, and that there is $48,192.13 due therefor; that Gramophone shipped Mercury 709 matrices, which were loaned to Mercury at a prescribed rental fee, and that Mercury has refused to return 411 of the matrices, to the damage of Gramophone of $20,000; that Mercury agreed to pay Gramophone a rental fee of $5 or $8 for the mat-
120 rices (10 and 12 inches respectively), plus packing and transportation charges, and Mercury owes Gramophone $4,770.95 therefor; that Mercury produced long-playing records in addition to regular 10 and 12 inch records in violation of its agreement with Gramophone, and paid no royalties thereon and owes $25,000 therefor; that on August 18, 1949, Gramophone gave Mercury notice of Mercury's breach of the agreement and gave thirty days' notice that the agreement would be terminated if the breaches

were not remedied; that on September 23, 1949, Gramophone terminated the agreement and demanded that Mercury cease the production and sale of the records and return the same to Gramophone, but Mercury has refused. Total damages of $120,467.65 and an injunction are sought by Gramophone in its suit against Mercury.

Mercury's answer to the Gramophone suit pleaded a number of defenses and counterclaims, seeking damages of $423,925.80. Mercury also seeks an accounting of masters, matrices and finished records sold or used by Gramophone in Czechoslovakia and that Gramophone be enjoined from the exploitation or sale of defendant's (Mercury's) records in Czechoslovakia or any foreign country. The answer 122
was filed June 26, 1950.

[116] From the pleadings in the suit of Gramophone against Mercury it appears that large sums are claimed by both sides to that litigation. Only thirty-four of the matrices are involved in this litigation of Capitol against Mercury. Whether or not there are sums claimed by Gramophone on these thirty-four records in its suit for an accounting against Mercury, does not definitely appear. It may very well be, however, in view of the scope of the Gramophone-Mercury litigation, that at least part of what plaintiff Capitol is seeking in this case from Mercury, is also being claimed by Gramophone from Mercury. It indicates that the sums involved are large and that Mercury 123
has not been damaged by any alleged delay on Capitol's part in asserting its rights. Mercury's conduct in respect to the thirty four records was deliberate and with full knowledge of Capitol's claim of title to the performances of these thirty-four records and Mercury is persisting in its course of conduct. On such a showing a court of equity will direct not only an accounting of Mercury's profits on the thirty-four records involved in this action but will also

protect plaintiff Capitol from any continuation of Mercury's illegal conduct by directing that an appropriate injunction be issued.

[17] Defendant's attorney argues that defendant is prior in time as to the date of its contract with Gramophone (November 6, 1947) as compared with plaintiff's contract with Telefunken (October 1, 1948), [349] and also prior in time in producing in America all but a few of the thirty-four records involved in this action. As to twenty-three of the thirty-four records, defendant, up to the date of the stipulation, was the sole producer in America. As to eight of the remaining eleven, the defendant was the first to pro-
125 duce; as to the balance of three the plaintiff had the earlier release date. However, plaintiff was the first to produce any one of the records here involved (Voices of Spring, April 4, 1949). Defendant released a number of records on May 1, 1949. I do not believe that in this suit the earlier date of contract or the earlier release date has any bearing on the question of title to the performance of the artist or to the right to produce records of those performances in America.

[18] Defendant's attorney further argues that there has been a failure of proof in respect to certain items (eight recordings) which defendant claims were not recorded by Erna Sack for Telefunken during the period covered by her
126 two contracts, October 1, 1934 to September 30, 1936 (Ex. B), and January 1, 1937 to December 31, 1938 (Ex. D). Plaintiff asserts that the contracts for the period during which the eight recordings were made for Telefunken by Erna Sack are lost or presently unavailable. That she made the eight recordings for Telefunken cannot be disputed. It is proper to assume that she made the recordings pursuant to a contract. Secondary proof of the contents of the contract may be submitted at the accounting

which will be heard by a special master. The question raised is related to the matter of damages.

[19] Finally defendant Mercury urges that it is paying royalties to Stravinsky who is now in this country, and that Mercury has an agreement with Stravinsky permitting Mercury to reproduce here the recordings Stravinsky made for Telefunken under his contract with Telefunken. Stravinsky could not give to Mercury any rights which he had already given to Telefunken. At best the Mercury-Stravinsky contract was a move on Mercury's part to ward off any demands of Stravinsky and at the same time give Mercury some source of claim of title to bolster Mercury's claims 128
under its contract with Gramophone. Of all the thirty-four records, Stravinsky's record ("The Card Party") which was released by Capitol on September 5, 1949 and by Mercury over a year later (October 2, 1950) was the only Telefunken recording on which Mercury paid any royalty to the artist who made it. Defendant also argues that three of the numbers were recorded in Amsterdam and one in Prague and that they were subject directly to the laws of countries later at war with the Third Reich, and that that may create posible problems of jurisdictional conflict which would tend "to confuse further the confusing claims made herein". There is nothing presented to support that statement. It is based on a surmise, not proof.

A decree will be entered herein in favor of the plaintiff, 129
which will declare:

(1) That plaintiff, Capitol Records, Inc., is alone entitled to manufacture and distribute in the United States of America phonograph records made from the matrices of the thirty-four musical compositions involved in this litigation, said matrices having been made by Telefunken from recordings of the artists named therein, and to the use of the name Telefunken in connection therewith;

(2) That defendant, Mercury Record Corporation, is not entitled to manufacture or distribute any records in the United States of America made from the matrices of the said thirty-four musical compositions which were furnished Mercury by Gramophone Works National Corporation.

And the said decree will provide:

(3) That defendant, Mercury, its agents, officers, directors, managers, salesmen, solicitors, employees and servants be enjoined from using said thirty-four matrices, derivatives and duplicates in the manufacture of phonograph records or otherwise, and from the sale or distribution in
131 any manner of phonograph records produced therefrom, and from the use in any form or manner or in any medium, the name "Telefunken":

(4) That the defendant Mercury pay the plaintiff Capitol the amount of any damages [350] sustained by Capitol by reason of Mercury's manufacture and distribution of phonograph records of the thirty-four musical compositions involved in this action:

(5) That the defendant Mercury pay the plaintiff Capitol the profits Mercury has derived from the manufacture and sale of phonograph records of the thirty-four musical compositions involved in this action:

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(6) That a special master be appointed to ascertain the amount of plaintiff's said damages and of defendant's said profits:

(7) That plaintiff recover its proper costs and disbursements.

Settle a decree accordingly on five days' notice.

23215

To be argued by:
PAUL J. KERN.

United States Court of Appeals

FOR THE SECOND CIRCUIT

CAPITOL RECORDS INC.,
Plaintiff-Appellee,

v.

MERCURY RECORD CORPORATION,
Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

PAUL J. KERN,
Attorney for Defendant-Appellant.

On the brief:
RHODA HENDRICK KARPATKIN.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

CAPITOL RECORDS INC.,
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v.
MERCURY RECORD CORPORATION,
Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

I

Treaties and international compacts indubitably sustain defendant-appellant Mercury.

A main point of defendant-appellant here is the unquestioned treaty rights of the Czechoslovakian government in these records under the Treaty of Paris of January 24, 1946. (Point II of defendant appellant's brief.)

In attempting to answer this point plaintiff-appellee claims that this property was properly under the Control Council for Berlin under the Potsdam agreement. (Point II of plaintiff appellee's brief, p. 344 of decision below.)

Unfortunately for plaintiff appellee, this contention has been specifically rejected by the Allied High Commission for Germany itself by Act of September 5, 1951, in a "Law Clarifying the Status of German External Assets and of Other Property Taken by Way of Reparation or Restitution." (Official Gazette of the Allied High Commission, p. 1107, 5 Sept. 1951, Law No. 63.)

This Law provides as follows:

"Whereas international agreements have been entered into by the Allied Powers with respect to the liquidation of German external assets and the removal of property from Germany for the purpose of reparation * * *

Whereas property has been or may be transferred, liquidated or delivered in accordance with the aforesaid agreements and declarations and

Whereas it appears expedient to give recognition by legislation to, and to *define certain legal consequences of the divesting of title to the aforesaid property*,

Now therefore for the purpose of quieting title and *of preventing unwarranted disputes and litigations*,

The Council of the Allied High Commission enacts as follows:

ARTICLE 1

1. The provisions of this Law extend to the following property:

(a) any property which, on or prior to the effective date of this Law, *was located in any foreign country and German owned and which, after September 1, 1939, has been or will be transferred or liquidated under the law of such country* or under the law of any other country by agreement with the former country

(i) pursuant to measures taken in connection with the war against Germany by the government of any country which has adhered to the United Nations Declaration of January 1, 1942

(ii) pursuant to any agreement, accord, or treaty regarding the disposition of German external assets which has been or will be concluded with the participation of France, the United Kingdom, and the United States of America, or

(iii) pursuant to measures take in satisfaction of claims against Germany * * *.

(b) * * *.

ARTICLE 2

1. All rights, title or interest of *former owners* to or in property to which this Law applies *shall be deemed to be extinguished* * * *.

(a) in the case of property within the purview of Article 1, paragraph 1 (a), and at the date of transfer or liquidation, * * *.

ARTICLE 3

No claim or action based on or arising out of the transfer or, liquidation or delivery of property to which this Law extends shall be admissible:

(a) against *any person* who has transferred or *acquired title to or possession of such property*, or against such property,

(b) against any international agency, any government of a foreign country, or any person acting in conformity with the instructions of such agency or government.

ARTICLE 4

For the purposes of this Law

(a) the term 'foreign country' means any country except Germany and the countries listed in the Schedule attached to this Law (Czechoslovakia not listed). * * *

(c) the term 'property' includes all *tangible or intangible*, movable or immovable property. * * *

ARTICLE 5

Articles II and III of Control Council Law No. 5 * * * are hereby *deprived of effect* in the territory of the Federal Republic so far as they relate to assets subject to the jurisdiction of countries other than those listed in the Schedule to this Law. (Italics added throughout.)

31 August 1951

On behalf of the Council of
the Allied High Commission

(s) JOHN J. McCLOY."

There could hardly be a more lucid statement of the law and policy of the Control Council than this clear statement that the rights of all former owners (such as Telefunken) in external assets, are "extinguished" (Article 2, par. 1).

In fairness to the Court below it should be stated that this Law was not cited in the briefs below, and it is possible in view of the decision rendered that this controlling statute was not available to His Honor.

It should further be noted that this law covers all tangible or *intangible* property. This is important only because plaintiff-appellee continues to argue that these works might have been in Prague under an export contract and that even if the works were seized the contract should survive.

Such an argument can hardly be taken seriously because there is no evidence in the record that these works were in Prague under any export contract. Indeed, such is hardly possible in some cases, since some of them (such as Keilberth, Symphony No. 4 in D Minor), were recorded in Prague (Ex. X) and the contracts relating to them were made there (Ex. I). So for practical purposes this claim is unsupported by the record

As a legal proposition, however, defendant appellant does not accept this argument. To admit that a sovereign state can seize physical property but is powerless to abrogate private contract rights in such property is ridiculous and refuted by the specific language of the statutes involved, which refer to "intangibles" or "rights," in all cases (Ex. K, Sect. 3(2) and Art. 4, par. (c) of Allied High Commission Law 63, cited above). Such argument of sovereign paralysis over contract rights is likewise refuted by our own Supreme Court in numerous cases (such as *Ricaud v. American Metal Co.*, 246 U. S. 304 (1917)). It is senseless to claim that the sovereign which can destroy property rights in toto can not interfere with private contracts concerning such rights, and if any such doctrine should receive

serious judicial sanction it would render impotent our own alien property laws as well as those of all our Allies.

It follows therefore that the Treaty of Paris of January 24, 1946, as cited in Point II of defendant-appellant's main brief, together with the very lucid interpretation of the Treaty rights of the Allied powers under Allied High Commission Law 63, of 5 September 1951, confirm and solidify the claim made by Mercury that in taking these records from Prague, after legal seizure there, it took a perfectly valid property right which is recognized by treaty quite aside from its legitimate judicial recognition under established principles of comity in International Law.

II

Correction of certain misstatements in plaintiff-appellee's factual and background material (pp. 1-11).

1. Plaintiff-appellee states ("Nature of the Action," p. 2):

> "The defendant manufactures and sells the original recordings from derivatives which it claims under a seizure, made one year after its contract, by Czechoslovakia * * *."

The fact is that the derivatives in question were seized by Czechoslovakia in October 1945 (defendant-appellant's brief, pp. 2-3). The plaintiff and defendant had so stipulated below. Stipulation 3(m) in the Court Order (p. 3) provides that:

> "In 1945 the Government of Czechoslovakia issued confiscation and Nationalization decrees embracing the phonograph record industry under which, and implementing decrees, the property in the possession of Ultraphon including the Telefunken matrices in the custody of Ultraphon were seized and transferred * * *."

Defendant appellant claims under a contract made November 1947, more than two years later.

2. In "United States Military Government in Germany" (pp. 4, 6), plaintiff-appellee cites Law No. 5 of October 30, 1945, of the Control Council in Germany, vesting in its Commission all title to all German external assets.

This law is clearly irrelevant to the case at bar, a temporary measure enacted by the newly victorious Allies until a reparations agreement could be worked out. It is clearly superseded by the Paris Reparations Agreement of January 14, 1946, which contains all provisions for reparations and for the disposition of external enemy assets (defendant-appellant's brief, p. 16). It is further *repealed retroactively* by Law No. 63 of the Allied High Commission for Germany, 5 September, 1951 (Official Gazette of the Allied High Commission for Germany, 5 September, 1951, p. 1107 ff).

3. Plaintiff-appellee seeks to endow the Joint Export-Import Agency with some sort of legal or political power (pp. 5, 61, placing great stress on its approval of the Capitol-Telefunken agreement.

The fact is that it was a purely economic agency, whose power extended to price fixing, and the determination of the place and period of delivery of exports, etc. (See court decision, 109 F. Supp. 342-3). Its approval has no further significance and is irrelevant here. (It may be further noted that this approval was given on October 1, 1948 (plaintiff-appellee's brief, p. 17), *after* the seizure of the Telefunken matrices by Czechoslovakia, and there is no evidence that at the time of this approval the question of Czech title was considered).

4. Plaintiff-appellee states (p. 7, top) that Control Council Law No. 5 preceded in time the Czechoslovakian decrees on which defendant-appellant relies.

The fact is that Law No. 5 was issued on October 30, 1945 (plaintiff-appellee's brief, p. 4) and the decrees on which

defendant relies were issued October 24 and 25, 1945 (defendant-appellant's brief, p. 16). While defendant-appellant considers the Control Council Law No. 5 irrelevant, it nevertheless respectfully observes that October 30 is later than October 25.

5. Factual data in correction of plaintiff-appellant's allegations concerning the Czechoslovakian Nationalization Decrees (pp. 7-9):

A. Plaintiff-appellee alleges (p. 7) that the Czech confiscatory decrees of October 1945 did not seize nor take title to anything.

The fact is that the October 24-25 decrees were effective immediately without any need for implementing decrees. Section 1 of Exhibit K provides that "On the day of promulgation of this Decree (October 24), the following enterprises are nationalized by becoming State owned * * *" and specified the manufacture of gramophone records. It further specifies that no compensation is to be paid for nationalized property belonging to enemy Germans. It is stipulated by the parties that this decree is "effective in accordance with (its) purport" (Stip. Par. 4(e), p. 2 of Court Order). No provision is made for a delay in the vesting of title until implementing decrees are issued, and title was taken immediately as provided therein.

B. Plaintiff appellee alleges (p. 7) that the decrees make no reference to war reparations.

The fact is that the decrees make clear reference to war reparations. Exhibit K describes the Decree "concerning confiscation of enemy property and Funds of National Restoration." The Preface by Pres. Benes to his booklet entitled "Nationalization in Czechoslovakia" containing the October decrees (Stip. Par. 3(z), p. 5 of Court Order), states (pp. 7-8) that the property of German nationals was seized on October 24 and 25 "as partial reparation for the enormous war damages caused by Germany" and "as the property of traitors."

C. Plaintiff-appellee states (p. 7) that the decrees are ineffective if in conflict with the Potsdam Agreement.

The fact is that the nationalization is clearly in keeping with, and in implementation of the Potsdam Agreement, which determined that reparations were to be made in kind, and that claims were to be satisfied from German enemy assets within the jurisdiction of the Allied countries (Howard, The Paris Agreement on Reparation From Germany, Vol. IV, Dept. of State Bull., June 16, 1946, pp. 1023-41). This is what Czechoslovakia accomplished by the decrees in question.

D. Plaintiff-appellee alleges (pp. 7-8) that Decree Exhibits L and M did not seize Telefunken matrices.

The fact is that by these decrees Telefunken's matrices were seized. The need to place these facts in evidence was obviated by the parties' stipulation (Par. 3(m), p. 3 of Court Order).

See discussion of Decree Exhibit O, *infra*.

E. Plaintiff-appellee alleges (p. 8 top) that the seized property is limited to physical property within Czechoslovakia.

The fact is that the terms of the decrees refer not only to "physical property" but to "enterprises situated within the boundaries of Czechoslovakia" (Ex. N). It is also the pattern of the various decrees to nationalize with the enterprises "all rights (patents, licenses, franchises, trademarks, samples etc." (Exs. L, M).

F. Plaintiff-appellee alleges (p. 8) that no decree prior to the Grammaphone-Mercury agreement attempted to seize anything belonging to Telefunken.

The fact is that Stip. Par. 3(m) (p. 3 of Court Order) provides that in 1945 Ultraphon together with its Tele-

funken matrices were nationalized. When Gramaphone was organized in March 1947, these were transferred to it (Ex. N, Sects. F(3) and F(4). The Gramaphone-Mercury contract is dated November 6, 1947.

G. Plaintiff-appellee alleges (p. 8) that Exhibit O, the November 27, 1948 decree, was the first affecting Telefunken's property.

The fact is that the decree of December 27, 1945, specifically seized Telefunken's property (Decision, 109 F. Supp. 337). The terms of Exhibit O refer to Telefunkenplatte G.m.b.H. Berlin as an "enterprise which forms together with the (previously) nationalized enterprise (Telefunken fuer drahtlose Telegraphie G.m.b.H.) an economic entity and is decisively controlled by the nationalized enterprise." This decree implemented the various prior decrees (Decision below, 109 F. Supp. 337). The confiscation decree of December 27, 1945 (Ex. L), seized the named enterprise and "all ancillary enterprises and works belonging to the same owner, as well as all enterprises and works forming an integral part of the nationalized property (see also Ex. K, Sec. 103).

H. Plaintiff-appellee alleges (p. 9) that the Decree of November 29, 1948 (Ex. O) is the first one transferring Telefunken property to Gramaphone.

The fact is that Exhibit N, Secs. F(3) and (4) transfer to Gramaphone the former Telefunken property, on March 7, 1946.

6. Plaintiff-appellee cites the Adjunct to the Paris Treaty (pp. 9-10). This Adjunct applies only to German external assets, assets located within countries members of the Inter-Allied Reparations Committee. It therefore could not apply to any assets located within Germany itself (defendant-appellant's brief, pp. 16-17). (See footnote 32, defendant appellant's main brief.)

III

There is no unfair competition in this case (analysis of cases cited by plaintiff-appellee).

1. The case at bar is not governed by *Metropolitan-Opera Assn v. Wagner Nichols Recorder Corp.*, 199 Misc. 786, 101 N. Y. S. 2d 483, aff'd 279 App. Div. 632, 107 N. Y. S. 2d 795 (1950) and the cases cited therein [referred to on pages 11, 12 of plaintiff-appellee's brief and page 345 of the decision below]. The *Metropolitan* case is not in point and its doctrine has been rendered inapplicable to situations like the one at bar.

A. The *Metropolitan Opera* case distinguished:

1. The *Metropolitan Opera* case found that "the performance of operas by Metropolitan Opera and their broadcast over the network of American Broadcasting cannot be deemed a general publication or abandonment so as to divest Metropolitan Opera of all its rights to the broadcast performance." 101 N. Y. S. 2d 494. This finding was the prerequisite for upholding the allegation of unfair competition. Only if Metropolitan Opera retained its property right in its radio performance could it have any cause of action for unfair competition.

In the case at bar, plaintiff-appellee alleges unfair competition with its recorded performances. But here the recorded performances are clearly in the public domain, and the lower court decision fails to make any finding as to publication and abandonment negativing this fact. According to *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (2d Cir., 1940) (which, incidentally, fails to find that a performance like that of the Metropolitan Opera is not an abandonment),

> "the 'common-law property' in those performances ended with the sale of the records * * *." (p. 88)
>
> "if the 'common-law property' in the rendition be gone, then any one may copy it who chances to hear it, and may use it as he pleases" (p. 89).

2. *International News Service* v. *Associated Press*, 248 U. S. 215 (1918), which is the major precedent for the decision in the *Metropolitan Opera* case, also was based on a finding of no abandonment on publication. This is true also of all the cases relied on for the holding of no abandonment in the *Metropolitan Opera* case (p. 494).

3. An important element in the finding of unfair competition in the *Metropolitan Opera* case is the damage done to the opera association's professional reputation and professional program by the continuation of defendant's activities. The irreparable harms found by the Court to result from defendant's continuing to make records from plaintiff's radio performances were: (a) the distribution of records inferior to those which the Metropolitan approves for release to the public as an example of its work; (b) prevention of the conclusion of a new contract between the Met and ABC for exclusive broadcasting rights; (c) jeopardizing the recording of several new operas with the authorized recording company, and loss of royalties from authorized records (p. 493-500). Nothing comparable in substance is alleged in the case at bar.

4. Considerations of business ethics form the basis of the extension of the amorphous unfair competition doctrine to cases not involving fraud and palming off (p. 488). The extension in the *Metropolitan Opera* case is aimed at defendants' "commercial immorality" (p. 498), at their "unconscionable business practices and their invasion of the moral standards of the market place" (p. 500). The decision is an attack on "business conduct which is abhorrent to good conscience" (p. 500).

In the case at bar, defendant fairly contracted for the records involved, and did not seek to appropriate the ingenuity and labor of others without compensation.

B. The *Metropolitan Opera* decision has been held in prior decisions not to apply to situations such as the one now at bar.

1. The *Metropolitan Opera* decision is based primarily on the holdings in *I.N.S.* v. *A.P.* and in *Fonotopia* v. *Bradley*, 171 Fed. 951 (E. D. N. Y. 1909). See 101 N. Y. S. 2d 489-91, 492, 107 N. Y. S. 2d 797, and plaintiff-appellee's brief, p. 12. The holding and reasoning of the *Metropolitan Opera* case generally, and these precedents specifically, have been clearly repudiated insofar as they pertain to situations such as the one at bar.

In *Ricordi* v. *Haendler*, 194 F. 2d 914 (2d Cir., 1952) and *RCA* v. *Whiteman*, 114 F. 2d 86, the courts refused to extend the doctrine of the *I.N.S.* v. *A.P.* case beyond the unique and specific fact situation on which it was based. In the *Whiteman* case, especially, the court pointedly refused to extend the *I.N.S.* doctrine to the case then at bar (p. 90), and denied relief on the basis of unfair competition. This is all the more significant because this is a complete reversal of the decision by Judge Leibell in the *Whiteman* case below, 28 F. Supp. 787 (S. D. N. Y., 1939), which relied precisely on the "reasoning and legal principles of the INS case" to find against the defendant (p. 794). It should further be noted that in his opinion in the case now at bar, Judge Leibell again invokes the presumably laid-to-rest ghost of the *I.N.S.* case, both by citing the *Metropolitan Opera* proposition taken from the *I.N.S.* case and by invoking the cases cited by the *Metropolitan Opera* decision to support his holding (109 F. Supp. 345).

A recent rejection of the *I.N.S.* doctrine occurred in the *Ricordi* case, where Judge Hand reiterated that

> "we have several times declared, that the decision (*I.N.S.* v. *A.P.*) is to be strictly confined to the facts then at bar" (p. 916).

and cited in support of this his decision in *RCA* v. *Whiteman*.

2. The *Metropolitan Opera* case, the Court below here (p. 345), and plaintiff-appellee all rely on the *Fonotopia*

case. This decision however has been overruled by Judge Learned Hand insofar as it conflicts with the holdings of the *Ricordi* case (p. 916), which governs the case at bar.

II. The remainder of plaintiff-appellee's precedents do not govern the case at bar.

1. *Mutual Broadcasting System v. Muzak Corp.*, 177 Misc. 489, 30 N. Y. S. 2d 419 (1941) (plaintiff-appellee's brief, p. 12):

The decision in this case is based on the *I.N.S.* case.

2. *Roman Silversmiths Inc. v. Hampshire Silver Co. Inc.*, 282 App. Div. 21, 121 N. Y. S. 2d 329 (1953) (plaintiff-appellee's brief, p. 12):

This decision merely enjoined defendants from "'falsely' representing that defendant * * * had and was prepared to sell the identical articles which plaintiff sold" (p. 333). The crucial factor in this case was that the Court allowed the use of "photographs made directly from products they (defendants) themselves manufacture even though they are similar or substantially the same as plaintiff's products" (p. 334).

This holding would be applicable to the instant case, if at all, only if defendant were accused of using photos of plaintiff's records, and then only to the extent of preventing the use of copies of plaintiff's photos, but not of plaintiff's product, the records.

The decision is significant also in this respect: it supports the unfair competition doctrine that to make a lawful act unlawful, there must be malice admixed with any other factor and exclusively directed to the injury and damage of another (121 N. Y. S. 2d 333).

3. *Acadian Co. v. Regal Mosa Roll Co.*, 196 Fed. 926 (W. D. N. Y., 1912) (plaintiff-appellee's brief, p. 13): This

was one of the earliest cases involving record manufacturing. The decision undertakes to interpret the Copyright Act so as to give to the licensee record manufacturer the protection which the Act actually afforded only to the owner of the copyright. Today there is no question but that the protection granted under the Copyright Act does not apply to record manufacturers, and the *Aeolian* decision granting a cause of action to one under the statute is now an anachronism. See Comment, Piracy on Records, 5 Stanford L. R. 433, 443 (1953).

4. *Ricordi* v. *Haendler*, 194 F. 2d 914 (2d Cir. 1952) (plaintiff-appellee's brief, p. 15): The quotation offered by plaintiff-appellee's brief continues as follows:

> "but it would have to be by some conduct other than copying it" (p. 916).

5. *Dutton & Co.* v. *Cupples*, 117 App. Div. 172, 102 N. Y. Supp. 309 (1907) (plaintiff-appellee's brief, p. 15): This is cited in the decision below at pp. 346-347. The major point in that case is not that plaintiff's books were "embellished" but that the defendants were "fraudulently attempting to trade upon the reputation which plaintiff (had) built up for its books" and that plaintiffs were "threatened with a loss of reputation as producers of fine and artistic books". The court there stated the key to the case as the probability of the deception of the public (pp. 311-312). In the case at bar, there is no element of fraud or deception involved.

From a realistic standpoint there was neither anything unfair or anything competitive about the conduct of Mercury (defendant-appellant) here.

Mercury bought these records from a sovereign state for a legitimate purchase price. It paid thousands of dollars in royalties for them. It was the business initiative and ingenuity of Mercury that brought these works to market here. (This purchase, incidentally, was made from

the Benes government.) There was, therefore, nothing unfair in the conduct of Mercury.

Neither was the action of Mercury competitive. Neither Telefunken nor Capitol (plaintiff-appellee) had ever produced or sold these records on the American market before Mercury brought them here. After Mercury brought them, and after the promotion and initiative of Mercury had made the venture a prospective success, Mercury's giant competitor Capitol decided to elbow in and went to Berlin for this purpose.

The Berlin deal by Capitol is not distinguished for its moral probity. Recently part of the Reich "Culture Chamber," Telefunken is already playing both sides of the street in the cold war.[1] It was naturally happy to find an American sponsor for a line which by itself it never presented to the American market.

But this deal came very late. Mercury had already promoted and proven the musical success of these records and thirty and one-third of the thirty-four records involved here were produced and marketed first in the United States by Mercury.[2]

Mercury insists, therefore, on the merits of its counterclaim if this is to be considered a case of unfair competition. Mercury was first in the market. Its business initiative and ingenuity made this line a success in the United States

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[1] The New York Herald Tribune, ~~Sept.~~ Dec. 20, 1953, in an article headed "Reds Still Trailing in Air Power" states [Sec 9, col 2, p 3]

> "But the Kremlin is conscious of these air deficiencies and will try to remedy most of them in the next few years. Top ranking German specialists in radar and radio counter measures from Siemens and *Telefunken* (emphasis supplied) have for the last eight years been helping in the manufacture and use of this equipment."

[2] See footnote 55, p. 29 of defendant-appellant's main brief

and Mercury, as a comparatively small competitor in this highly competitive business, is entitled to the fruits of its priority in the field.

Respectfully submitted,

PAUL J. KERN,
Attorney for Defendant-Appellant.

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To be argued by:
PAUL J. KERN.

United States Court of Appeals

FOR THE SECOND CIRCUIT

CAPITOL RECORDS INC.,

Plaintiff-Appellee,

v.

MERCURY RECORD CORPORATION,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

CAPITOL RECORDS INC.,
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MERCURY RECORD CORPORATION,
Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

Introduction and Statement of Facts

This action was brought on July 15, 1949, by Capitol Records Inc., a domestic corporation (hereinafter called "Capitol"), for an injunction and damages against Mercury Record Corporation (hereinafter called "Mercury"), because of the sale in the United States by Mercury of some thirty-four records recorded originally in Prague, Amsterdam and Berlin between 1933 and 1941.

Defendant Mercury claims title to the records under Gramophone Works National of Czechoslovakia, a Czechoslovakian government corporation (hereinafter called "Prague") under a contract made on or about November 6, 1947.[1]

Plaintiff Capitol claims title under Telefunkenplatte GMBH of Berlin, Germany (hereinafter called "Berlin"), under a contract made about a year later, or about October 1, 1948.[2]

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[1] Stip. par. 3 n, Ex. Q
[2] Stip. par. 3 o, Ex. S

It is conceded that there is no copyright protection of any of this material in the United States.[3] Exclusive rights, if any, do not exist under copyright law.

Also:

> "Plaintiff concedes that defendant (Mercury) did not use or authorize the use of said ('Telefunken') name, trade name, or trade marks" (Stip. par. 3 r).

Two motions by the plaintiff for summary judgment and injunction were denied in the Court below.[4]

The matter was submitted below on stipulated facts and exhibits on March 18, 1952. An opinion upholding plaintiff-appellee Capitol was filed September 26, 1952. A decree and order granting an injunction against Mercury and appointing a Special Master to ascertain damages and for other purposes was entered July 2, 1953. An appeal was duly noticed and by order of this Court such appeal was allowed on a typewritten record (Nov. 9, 1953).

Further relevant facts, as stipulated, are as follows:

From and after December 16, 1941, the government of Czechoslovakia, which was and is a friendly government, was at war with Germany.[5]

Upon the successful conclusion of this war, and "as partial reparation for the enormous war damages caused by Germany"[6] and "as the property of traitors" the Czechoslovak government seized all property of German nationals on October 24 and 25, 1945.[7]

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[3] Stip. par. 3 p, q.

[4] By Hon. Sylvester J. Ryan, Sept. 21, 1949. By Hon. Gregory F. Noonan, Dec. 8, 1950.

[5] Stip. par. 3 w, x.

[6] "Nationalization in Czechoslovakia" by Eduard Benes, President, Czechoslovak Republic, pp. 7, 8. Published by Orbis, Prague, June 1946. Quotation stipulated by par. 3 z.

[7] Decrees of the President of the Republic of Czechoslovakia, 100, 108, October 24, 25, 1945. Ex. K herein.

The decree seizing these properties, much similar to the vesting of alien property in the United States, was very broad, providing, in the case of phonograph companies, that it included all "rights (patents, licenses, trademarks, design, etc.) * * *" as well as all physical property.[8] It is stipulated that these decrees "are effective in accordance with their purport".[9]

The masters of the thirty-four records involved in this proceeding were the property of a German national, Telefunken, were physically present in Prague and were seized there by the Czech government under the aforesaid decrees (Stip. par. 3 m).

On or about November 6, 1947 (before the Communist coup of February 25, 1948), the Benes government in Prague made these masters available to Mercury by duly executed contract and they were thereupon released for sale in the United States by Mercury.[10]

Twenty-three of the records have been issued by Mercury alone and not by Capitol. Of the eleven issued by both, Mercury is prior in time with seven and one-third and Capitol is prior with three and two-thirds.[11] Mercury therefore is prior on the American market with thirty and one-third of the thirty-four records.

Under the Treaty of Paris, January 24, 1946, the right of Czechoslovakia to "dispose" of enemy assets as it "chose", was confirmed and accepted by the United States and seventeen other countries. The relevant section (61 Stat. *

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[8] Ibid.

[9] Stip. par. 4 c

[10] Stip. par. 3 n and Ex. Q

[11] Stip. par. 4, Ex. N. The fractional count is due to the release by Mercury of three numbers on one issue at 33⅓ rpm while the same number occupied three Capitol records at 33⅓, 45, and 78 rpm.

[*] Agreement on Reparations from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold (U. S. Department of State, Treaties and Other International Acts Series 1655)

> "Each signatory government shall, *under such procedures as it may choose*, hold or *dispose* of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control * * *." (Emphasis supplied.)

Plaintiff Capitol asserts its claim under Telefunkenplatte GMBH of Berlin through a contract made October 1, 1948, about a year after the Mercury-Prague contract. Telefunken claims ownership of the records before their seizure in Prague in 1945.

In the case of eight of the works plaintiff Berlin-Capitol has produced no contracts supporting even this claim.[13]

All of the works produced from Berlin were made under Nazi racist laws which excluded artists of certain ethnic groups from performing.[14]

On these facts the argument of defendant-appellant Mercury is as follows:

I. In the absence of copyright there is no property right in an artistic performance as such and Mercury which had legitimate possession of these masters was therefore entitled to sell the records made therefrom.

II. By Treaty with the United States, Czechoslovakia had a right to "dispose" of enemy assets as it saw fit and was therefore entitled by law to sell these records in the United States.

III. Capitol-Berlin cannot invoke the aid of an American court to enforce rights which accrued under Nazi racist laws which are specifically contrary to the public policy of this forum.

IV. Failure to join indispensable parties is fatal to the claim of plaintiff-appellee here.

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[13] LaFollette, If Roses are Offered in Tyrol, Canzonetta, I Am In Love, No One Loves You, etc., On the Beautiful Blue Danube, When a Lovely Lady Falls in Love, Village Swallows From Austria. See footnote 52

[14] Stip. par. 3 a.

V. Failure of the Court below to find facts and state separately its conclusions of law thereon, pursuant to Equity Rule 70½, Rule 52, R. C. P., 28 U. S. C. A., was error, and was highly prejudicial to defendant-appellant.

POINT I

In the absence of copyright there is no property right in an artistic performance as such and Mercury, which had legitimate possession of the masters in this case, was therefore entitled to sell the records made therefrom.

None of the material involved here was protected by copyright and it was, therefore, entirely public domain.[15] No claim is made that defendant-appellant Mercury made use of the Telefunken name, trade name or trade marks (Stip. par. 3 r).

It is well settled in the United States that the mere presence of public domain material on a platter disc does not metamorphose it into anything other than its original status— public domain material. Madame Caterpillar does not legally become "Madame Butterfly" merely by being pressed in wax.

The United States is not a signatory to any international copyright agreement and has repeatedly refused to join any such. So consistent is this position of our country that even the occasional efforts to change the law hardly attract public notice.[16]

[15] Stip par 3 p, q

[16] All such efforts have been abortive. One of the most recent, reported in the New York Times in a dispatch of October 29, 1939 from Geneva, under the heading "No Accord Reached on Performer Rights", reports the futile efforts of a group of performers to establish a right of compensation for "recorded and broadcast performances of their work * * *". Last year, a House committee killed a bill to give copyright protection to books by aliens written in English but not printed in the United States. Wall Street Journal, March 26, 1952

Plaintiff-appellee here merely seeks to do by judicial act what has never been done by legislation—to create and maintain a property right in an artistic performance, outside of copyright.

This attempt to establish a judicial copyright on artistic performance outside existing copyright laws is wholly insupportable. Since the leading case of *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (C. C. A. 2, 1940) cert. den. 61 S. Ct. 393, 311 U. S. 712, the undisputed law of the United States has been to the contrary.

In that case the question was whether an artistic performance on a purchased phonograph record could be protected against radio broadcast. An orchestral performance by Paul Whiteman, recorded and manufactured by RCA, was denied protection against radio broadcast by commercial radio even though the record bore a notice that the records were for non-commercial use and were not licensed for broadcasting.

This Court, in an opinion written by Hon. Learned Hand, held that there was no property right in such performance. He said:

> "* * * We think that the 'common law property' in these records ended with the sale of the records and that the restriction did not save it; and that if it did, the records themselves could not be clogged with a servitude" (p. 88).

And further:

> "If the common law property in the rendition be gone, then anyone may copy it who chooses to hear it, and may use it as he pleases" (p. 89).

This decision was unanimous.

The learned Court had compelling common law precedent on its side. In the leading English case the precise question of non-copyright artistic performance had been re-

viewed and settled in 1824, in the case of *Clementi v. Walker*.[13] In that case the artistic property claimed was a literary creation first published abroad, but not produced in England until after another had produced it there. The Court promptly settled the claim of the author under the foreign publication. It said:

> "The case, therefore, is reduced to this: whether an author who first publishes abroad and * * * forbears to publish (here) until some other person fairly * * * publishes here can insist upon his privilege, and * * * (later) stop a publication which, in the interim has taken place here, and treat continuance of that publication as a piracy, and we are of opinion that he cannot" (p. 870).

The leading common law case, incidentally, bears a startling similarity to the case at bar. There the artistic work (book) was first published abroad, just as these records were published abroad. Later, after another had published the book in Britain, the author claimed a prior right by reason of his foreign act, just as Berlin claims here that after local publication of these records by Mercury, it can stop them on the ground that it had them in Berlin all the time. In this analogous situation the *Clementi* case as cited and confirmed by the House of Lords is directly in point.

Even without the solid precedent and sound reasoning of the *Whiteman* case, therefore, it is clear that the plaintiff here must necessarily fail.

The leading text writer on this subject likewise states the same rule rejecting a property claim to artistic performance (outside of copyright). Horace G. Ball says:

> "After the absolute sale of phonograph records their use for radio broadcasting cannot be limited or prevented, even though each record has been inscribed by

[13] *Clementi v. Walker*, 2 Barnewell and Cresswell 861, 107 E. C. 601 (Kings Bench, 1824). Approved by the House of Lords in the subsequent case of *Jeffreys v. Boosey*, 4 H. L. C. 817, 10 E. C. 681 (1854).

> the manufacturer thereof with a notice that it is not licensed for radio broadcasts. Neither the manufacturer of the records who contributed his skill, nor the performing artist whose unique interpretation of musical selections are preserved in the records, has such a common law property to his intellectual production as would entitle him to prevent the purchaser of the records from playing them publicly for profit." (The Law of Copyright and Literary Property, Horace G. Ball, 1944, p. 453.)

This Court, hardly a year ago, had occasion once again to consider in the *Ricordi* case[18] the claim that an artistic performance, uncopyrighted, was entitled to protection. The artistic performance involved was the artistic illumination of a libretto on which the copyright had expired. The claim was made that even though the libretto could be copied the artistic illumination could not. The Court again flatly rejected this specious contention. Judge Learned Hand again wrote the opinion of the unanimous Court, and stated:

> "After the copyright did expire the public would certainly understand that they might reproduce the book without any limitation, and if it was permissible to prevent their doing so photographically, that expectation would be defeated" (p. 915).

Certainly if engraved art work can be photographed and reproduced freely unless copyrighted, a record pressed from a master of public domain material is equally entitled to see the untrammelled light of day.

In 1952 in the *Granz* case this Court succinctly made this same point regarding phonograph records when it said:[19]

> "* * * if the Plaintiff had any common law property in the musical productions, it did not survive the sale of the masters" (p. 910).

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[18] *G. Ricordi & Co. v. Haendler*, 194 F. 2d 913 (2d Cir. 1952).

[19] *Granz v. Harris*, 98 F. Supp. 906 (S. D. N. Y. 1951), aff'd 198 F. 2d 585 (2d Cir. 1952).

Since Prague took good title to the masters here by its war reparation seizure,[20] it is clear that under our law no common law right of the Nazis could "survive" that transfer of title.

The Courts of the State of New York likewise refuse to invent or create copyright protection where none is supplied by law.

This question, except in stronger form for the plaintiff since the plaintiffs were *artists* and not mere *recorders*, was presented in *Shostakovitch, Khachaturian, Prokofieff and Miaskovsky v. 20th Century Fox*, 80 N. Y. S. 2d 575 (Sup. Ct. 1948).

In this case the four plaintiffs, all very famous Soviet composers, were attempting to prevent the defendant, a motion picture company, from using sound tracks of their music for the background of a movie called the "Iron Curtain", which was violently anti-Soviet.

The defendant advertised this music as that of the composers plaintiffs.

Plaintiffs claimed that this was an infringement of their "moral rights" and also pointed out that the propaganda burden of the film—violently anti-Soviet—was in direct contradiction to their own views as citizens of the Soviet Union. Mr. Justice Koch, in a learned opinion denying an injunction to the plaintiffs, said in part:

> "The wrong which is alleged here is the use of plaintiffs' music in a moving picture whose theme is objectionable to them in that it is unsympathetic to their political ideology. The logical development of this theory leads inescapably to the Doctrine of Moral Right (53 Harvard Law Review). There is no charge of distortion of the compositions nor any claim that they have not been faithfully reproduced. Conceivably, under the doctrine of Moral Right the court could in

[20] It is stipulated that these reparation decrees were "effective in accordance with their purport" (Stip par 4 c)

a proper case, prevent the use of a composition or work, in the public domain in such a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well established rights of others to use such works (Clemons v. Belford Clark & Co., supra). So, too, there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined. Quite obviously, therefore, in the absence of any clear showing of the infliction of a wilful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked on either theory. The motion is accordingly denied in all respects" (pp. 578-9).

It should be noted that this case was a much stronger one for plaintiffs since the artists were physically joined, than the present one where none but the mechanical producer is suing. An appeal in the matter was discontinued though no settlement was made.

The second similar decision in the New York State Supreme Court to the same effect is possibly more compelling, since in such case the music had already been placed on records by the plaintiff before defendant's use. This is the case of *Beecham v. London Gramaphone Corp.*, 104 N. Y. S. 2d 473 (Sup. Ct. 1951), decided by Justice Valente.

In this case the plaintiff Beecham and the Royal Philharmonic Orchestra were under exclusive contract in the United States to Columbia Records Inc. for records. Beecham and the orchestra then made a sound track for a

British movie, which sound track was put on records by Decca Record Co. Ltd. and then sold in the United States.

This case again is much stronger for plaintiff than the instant case, since here again the artist was himself joined as plaintiff where in the instant case only a mechanical contractor has sought to enjoin competitive use. The Court held that there was no wrongful acquisition of the material, and denied the injunction sought, stating:

> "The defendants deny and have interposed facts to support such denial - that their conduct is wrongful. They claim and allege facts to show that Decca had the right to contract for the license to make records from the sound track. It is difficult, if not impossible, to understand how Decca is profiting from the Plaintiffs' exclusive contract with Columbia. Nor does it appear clear that Decca, in making the records under its license with the producer of the motion picture, seeks to or in fact has availed itself of anything done by plaintiffs or by Columbia. Competition should not be restricted by our courts until it is clearly established to be unfair and wrongful" (p. 477).

Certainly no claim can be made in the instant case that defendant-appellant has acquired this material wrongfully or that it is "profiting from plaintiff's" acts. Indeed, its right to acquire has been specifically ratified by treaty (January 24, 1946, of Paris (footnotes 12, supra, and 52, infra)). It follows therefore that the above holding is further confirmation of the law of the United States that music in the public domain is in the public domain.

The decision of Judge Valente in the *Beechaw* case was specifically followed in *Ayres* v. *London Films Productions, Inc.* (New York Law Journal, April 11, 1951, p. 1312) by Judge Benjamin Schreiber. The test imposed was again the test of good faith and Judge Schreiber in denying the injunction said:

> "* * * defendants deny that at the time the records were purchased * * * they had any knowledge that

> plaintiff possessed or claimed a contractual restriction upon the right to use the sound track for the making of records. In a previous action in England brought by Sir Thomas Beecham whose claim was similar to that now asserted by plaintiff injunctive relief against the Decca Record Company Limited was denied because the Court found that it had acted in good faith and without the knowledge that Beecham had granted no phonograph rights to the motion picture producer."

Neither the *Beecham* nor the *Ayers* case was prosecuted further and in each case the denial of the preliminary injunction determined the final issue.

The law as laid down by this mass of judicial authority is not only morally sound but publicly requisite.

It would be absolutely impossible, as a matter of public policy, for the Courts to establish a judicial copyright above and beyond the legislative copyrights now existing.

The problems of such judicial copyright would be insurmountable.

When, for instance, would the judicial copyright become effective?

How would such a judicial copyright be registered and who would provide this service?

How long would such a judicial copyright endure?

How would damages be assessed for the breach thereof?

These, and other questions, are not merely academic. In the instant case, for instance, the Court would have to decide whether the judicial copyright became effective:

> a. when the works were recorded in Germany (and elsewhere) or
>
> b. when they were first sold in the United States.

Either of the two dates would bring widely different consequences. If this judicial copyright attached at the time

of recording in Germany, for instance, it was a property subject to vesting in the Alien Property Custodian under 50 U. S. Code Appdx. 7, 9, etc., since all of the recordings were made after 1933 and prior to 1941 (Stip. par. 4, Ex. X).

If, on the other hand, the judicial copyright became effective when the works were first sold in the United States, then thirty of the thirty-four works here involved belong to defendant-appellant Mercury, since Mercury was prior in time on the American market with these works (Stip. par. 4, Ex. X, see footnote 55 infra.).

Then take the second problem: how long would such judicial copyright endure?

As a United States District Judge so wisely put it in a similar case:

> "If Plaintiff's argument is to succeed here, then a perpetual monopoly is granted without the necessity of compliance with the Copyright Act." [54]

But such perpetual monopoly "without the necessity of compliance with the Copyright Act" would unquestionably arouse strong public resentment. Even though the judicial decisions have not suggested this, several states have passed statutes providing that:

> "When such article (phonograph record) * * * has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser * * * and the right to further restrict the use made of the phonograph records * * * whose sole value is their use is hereby forbidden and abrogated." [55]

How would such a copyright be registered and who would provide this service? All over the world records are being made each day. How can an American recording

[54] *Shapiro, Bernstein and Co. v. Miracle Record Co.*, 91 F. Supp. 173 (D. C. N. D. Ill. 1950) at page 175.

[55] General Statutes of North Carolina, sec. 28 (1950), Code of Laws of South Carolina, sec. 101 (1952), Florida Statutes Annotated, 531.02 (1943).

company know that its current product has not been duplicated in some far off kiosk or cubicle, and that its sale here will not be followed by litigation for damages! And such damages would not be fixed as they are under the Copyright Law, but would be left in a hazardous limbo of uncertainty creating a sort of Halloween terror for the American record company with ingenuity and business initiative sufficient to bring such works to market.

The simple fact is that such a judicial copyright, as established by the Court below, would be an impossible and unworkable graft on the judicial system, as a practical matter, aside from its gross unfairness to a party such as defendant-appellant Mercury here.

The works here came into the hands of Mercury legally, through seizure by a government which had a right to seize them and sell them. They were produced here not through any wrongful act, fraud or theft, but by contract with that government. Later, after the initiative of Mercury commended itself to its huge competitor Capitol,[23] a subsequent deal, made with a former enemy, was contrived to shut out Mercury from this market.

Under the decisions of this Court, and the sound public policy of the United States, these records, after they were seized from Hitler's "Culture Chamber", were in exactly the same status on the American market as though they had fallen from a garbage truck—not, in fact, an inapt simile. Their sale by Mercury was not illegal.

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[23] According to published reports, plaintiff-appellee Capitol is fourth largest of American record companies, doing about $10,000,000 of business a year. Mercury is one of the smaller companies, whose gross approximates one-quarter of the above figure annually.

Capitol, though already large, has further larger ambitions:

> "The Company [Capitol] is seeking to supplant Decca Records among the industry's 'Big Three' which includes RCA Victor and Columbia", according to Glenn Wallichs, President of Capitol (Wall Street Journal, October 7, 1953).

POINT II

By treaty with the United States, Czechoslovakia had a right to "dispose" of enemy assets as it saw fit and was therefore entitled by law to sell these records in the United States.

The master records involved here were physically present in Prague at the close of World War II in 1945. There they were seized by the Czech government of Edvard Benes [24] as "partial reparation for the enormous war damage done by Germany".[25] This was and is a friendly, recognized government.[26]

The confiscation decree, very similar to our own vesting provisions under the alien property laws, provided that in addition to the physical property all "*rights, patents, licenses, trademarks, designs*, etc." were seized.[27] (Italics supplied.)

Probably most of these masters had been sent to Prague to avoid bombing in Berlin. Some of them were recorded there.[28] But there is no question of their physical presence under the jurisdiction of the then Czech government.

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[24] Stip. par. 4 c, Exs. K, L, M, N, O, P

[25] "Nationalization in Czechoslovakia" by Edvard Benes, President, Czechoslovak Republic, pp. 7, 8. Published by Orbis, Prague, June 1946. Quotation stipulated par. 3 z of stip.

[26] Stip. par. 3 x. "It is common knowledge and the Court is asked to take judicial notice thereof that the Government of Czechoslovakia before and after its territory was overrun by the Nazi regime of Germany, and at all times to date, was recognized by the United States government as a friendly government."

[27] Decree of the President of the Republic of Czechoslovakia dated October 24, 1945, published, No. 100, Sec. 4, subd. 2. Stip. par. 4, Ex. K

[28] Symphony No. 4 in D Minor, Op. 120, conducted by Keilberth, was recorded March 7, 1941, in Prague, for instance. The Prague German Philharmonic Orchestra was composed of Nazi musicians evacuated to Prague because of the bombardment of Berlin. Keilberth was a Nazi conductor. "The orchestra had nothing in common with Prague music life. The designation 'Prague' is misleading to the public of the United States." (V. Matajcek, acting consul gen-

On October 23 and 24, 1945, by the cited Czech government decrees, these masters became the property of that government.

Such property was the subject of international diplomatic consideration, and under date of January 24, 1946, a treaty was negotiated in Paris of which the United States and seventeen other countries, including Czechoslovakia, were signatories. This treaty provided in its relevant section (6A) as follows:

> "Each signatory government shall, *under such procedures as it may choose*, hold or *dispose* of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control * * *." (Emphasis supplied.)[29]

The Court below rejects the compulsive effect of this treaty on the basis of an adjunct to this treaty which reads as follows:

> "The assertion of custodian control over a German enemy interest in property within the territory of one party shall not be deemed to have destroyed the German enemy interest in property within the territory of another party."[30]

The application of this adjunct by the Court below is clear error. The adjunct refers to enemy assets *outside* Germany, i.e., "within the territory of one *party* * * * another *party*". There were eighteen parties to this treaty, but needless to say Germany was not one. The adjunct, there-

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eral, July 13, 1949). Apparently some of the contracts under which Capital claims here were made in Prague, as see the execution, Stip. par. 3, Ex. I, which reads "Heil Hitler, Telefunkenplatz, GMBH", then two illegible signatures, and "Prague, October 2, 1940, s. Joseph Keillerth"

[29] Agreement on Reparations from Germany, etc., U. S. Dept. of State, Treaties and Other International Acts Series No. 1655; Department of State Bulletin, Vol. XIV, No. 343, January 27, 1946, p. 114

[30] Dept. of State Bulletin, Vol. XVIII, No. 444, Jan. 4, 1948, p. 12.

fore, has no bearing whatsoever on the masters or rights claimed by plaintiff-appellee through Telefunken in Berlin since both during the war and through January 4, 1948 (the date of the adjunct), all of the masters claimed by Capitol through Berlin were *in Berlin*, the territory of the enemy. Even the contract under which Capitol purport to import them was not signed until October 1, 1948,[41] and the actual import of masters was therefore some time later.

This interpretation of the adjunct, to the effect that it had no relation to property in Germany, is incontrovertibly set forth by the authors of the agreement as follows:

> "practically all types of conflicting claims to German enemy assets *located in countries members of the Inter-Allied Reparation Agency* * * *." (Italics supplied.)
>
> "The types of claims covered by the agreement are those where the alien property custodians of two countries both claim the same German *external* asset or where an alien property custodian claims that certain property is owned by him beneficially through an intermediate corporation."[42]

The interpretation of this treaty by the Court below if allowed to stand, would nullify the entire purpose of the Treaty of Paris, and would also destroy by lack of comity the interpretation put upon our own alien vesting statutes by our Supreme Court. Our Court has held, for instance, that when the Alien Property Custodian seizes a debenture he also seizes the obligation represented by such debenture outside the United States.

> "Petitioners urge", said the Court, "that since the debentures themselves constitute the debt, and since the debentures were located outside the United States

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[41] Stip. par. 3 o

[42] An article by Maurer and Sunstrian, advisors to the U. S. representative at the negotiations, 42 Am. Journ. of Intnl Law 157 (1948) and Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets, Dept. of State Bulletin, Vol XVIII, No 444, p. 3

> at the time of vesting, the debts did not have a situs within the United States and therefore were not proper subjects of seizure. To apply this fiction here would not only provide a sanctuary for enemy investments and defeat a recovery of American securities located by conquering forces; it would also restrict the exercise of the war powers of the United States Congress. Congress did not so intend."[33]

This generous interpretation of the power of our own Alien Property Custodian will get short shrift from foreign courts if they find that the existence of duplicate masters in Berlin is enough to defeat the seizure of the originals as enemy assets in Prague under United States law.

The interpretation of these treaties by the Court below is incorrect on the face of the documents, and inadmissible as a matter of international law and comity. The Prague government, one of the eighteen signatories of the Treaty of Paris, is entitled, just as that treaty states, to "dispose" of enemy assets under "such procedures as it may choose".[34] Treaty provisions such as this must be construed liberally.[35] The Court below has misinterpreted the adjunct to that treaty, as shown by the comments of its own authors.[36]

The failure to acknowledge and enforce the Treaty of Paris in the Court below was error. It was not only prejudicial error to the clear treaty rights of defendant-appellant here. It was dangerous error in its import of enmity to the legally recognized acts of a foreign state which foreign state is continuously called upon to recognize and enforce the similar vesting acts of our own government.

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[33] *Clark Service Co. v. McGrath*, 342 U. S. 330 (1952) at 332, 334.

[34] Treaty of Paris, supra footnote 28.

[35] Mann, Enemy Property and the Paris Peace Treaties, 61 Law Quarterly Review 192 (1948).

[36] Supra footnote 31

POINT III

Capitol-Berlin cannot invoke the aid of an American court to enforce rights accrued under Nazi racist laws which are specifically contrary to the public policy of this forum.

Section a of paragraph 3 of the stipulation in the within case states:

> "(a) It is common knowledge, and the Court is asked to take notice thereof, that while Germany was governed by the Nazi regime, recordings by non-aryan artists were prohibited and the sale of records by aryan artists had to be approved by the Nazi regime."

All of the recordings here involved were originally made between June 1933 and March 1941, during the Nazi regime.[37] Plaintiff-appellee Capitol has no rights here which did not arise under these tainted contracts.

Very specific orders were issued for the Protectorate of Bohemia and Moravia by the Reich Culture Chamber. The order of March 27, 1941, read:

> "He who cannot prove his descent from ancestors of German or kindred blood back to the year 1800 for himself and his spouse with whom he was married on February 10, 1941, or with whom he enters a marriage thereafter, is not qualified to become a member of the Reich Culture Chamber and has to give up his profession. Such a person is not allowed any activity within the realm of the (specific) Reich Culture Chamber without a special license after March 31, 1941."[38]

[37] See par. 7, Ex. N

[38] Official Order No. 140 introducing Reich Culture Chamber legislation in the Protectorate. Official Bulletin of Reich Music Chamber, April 5, 1941. RMB 1941 No. 70. The order was issued by the President of the Reich Culture Chamber on March 27, 1941

This merely extended to the Czechs the restrictions which had been in effect on musicians, writers and artists in Germany from and after September 22, 1933.[39]

So strictly was this racist legislation enforced that when a Dutch citizen like William Mengelberg was hired, a special dispensation had to be given for him to conduct such decadent music as Mendelsohn's when outside the Reich. This generous concession was made to the Dutchman Mengelberg in the following terms:

> "On the other hand, you shall have the right to conduct the works of composers who fall under the German Non-Aryan laws, of the Chamber of Culture of the Reich, such as for example, Mendelsohn, Mahler, and Schonberg, even during the duration of this contract, with any other phonograph record firm in the world, without our being able to consider this an infringement * * *."[40]

That these despicable laws were and are contrary to the public policy of the United States is apparent, but any doubt that could have existed has been resolved by the formal statement of Jack B. Tate, legal adviser to the State Department of the United States, under date of April 13, 1949. This formal pronouncement is as follows:

> "2. Of special importance is Military Government Law No. 59 which shows this Government's policy of undoing forced transfers and restituting identifiable property to persons wrongfully deprived of such property within the period January 30, 1933, to May 8, 1945, for reasons of race, religion, nationality, ideology or political opposition to national socialism * * *. It should be noted that the policy applies generally despite the existence of purchasers in good faith."[41]

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[39] Reich Law Gazette 1933, Part I, p. 661

[40] Stip. par. 4, Ex. G

[41] Department of State Bulletin, Vol. XX, No. 514, May 8, 1949, at p. 593.

As if to emphasize the evil auspices of this case, Capitol lists thirty-four records it claims of which twenty-nine are by Erna Sack. Plaintiff-appellant Capitol yearns to pay Miss Sack for the records which were seized as war reparations by the Czechs.[12]

Now it so happens that the aforesaid Miss Sack, for whom Capitol holds such solicitude, is one of the rottenest of all the unreconstructed Nazi artists. So foul is her record, as a matter of fact, that the door is still slammed in her face by the United States Immigration Service whenever she rears her vocal head anywhere near the United States. This was not only true in the heat of past belligerency but is still true in 1953.[13]

It is this Miss Sack, subject of twenty-nine of the thirty-four records here, who will, if Capitol succeeds, be paid for the records seized by our ally as war reparations.

Miss Sack can meanwhile languish happily in her defenestrated state, secure in the knowledge that though the United States still officially considers her utterly un-

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[12] Paragraph 12 of the complaint "* * * said agreements * * * provide * * * in most instances also for the payment in addition of specified royalties based upon the number of phonograph records containing the artists' interpretative performances manufactured or sold."

[13] An AP dispatch from Honolulu, dated June 9, 1953, as published in the New York Herald Tribune and other newspapers on June 10, reports the latest of Miss Sack's abortive efforts to gain admission here. The dispatch states:

> "Honolulu, June 9 (AP).—The United States Immigration Service said today it had refused entry here last Saturday to German singer Erna Sack. She was on her way from Vancouver, B. C., to Australia.
>
> Lawrence H. Haus, officer in charge of the immigration and naturalization service office here, said Miss Sachs was barred under the McCarran-Walter immigration act.
>
> Mr. Haus said he was 'not at liberty' to say what the specific cause was.
>
> He said Miss Sack voluntarily returned to Canada when offered the alternative of a formal hearing."

desirable, a United States Court will save her from the consequences of her evil acts and faithfully collect royalties for records long since seized by an Allied Power.

That such a result could actually ensue from litigation in a United States Court would seem to defy not only international morality but public decency.

The Court below indicates that the approval of this deal with Capitol by the Joint Import and Export Agency vitiates the argument of public policy. An examination of the organic authority of that agency demonstrates beyond question that its only function was to determine whether imports and exports were within sound economic limits, and that this multi-power Agency had no other function.[11]

---

[11] Military Government Laws 53 (12 Fed. Reg. 7003) and 53 (Revised) (14 Fed. Reg. 7567), prohibited certain transactions, among them exports, unless licensed. As hereafter described, the Joint Export-Import Agency was given the authority to issue export licenses. By order BK (O) (46) 337 of the Allied Kommandatura, dated August 21, 1946, provisions similar to Military Government Laws 53 and 53 (Revised) were enacted in Berlin.

The Agreement for *Economic* Fusion of the United States and United Kingdom Zones in Germany of December 2, 1946, provided in paragraph 4:

> "Agency for Foreign Trade. Responsibility for foreign trade will rest initially with the joint export-import agency. * * *"

After January 15, 1948, the Joint Export-Import Agency (JEIA) operated under a charter, issued by the Military Governors of the American and British zones, acting in concert as the Bipartite Board. This charter was published in "Germany, 1947-1949" (Department of State Publication No. 3556). Beginning on page 463, it contains the following provisions:

> "17. The Agency shall be responsible, in accordance with the revised Bizonal Fusion Agreement and the general policies of the Bipartite Board, for the regulation of all imports and exports and for such direct procurement as may be required. It shall be the responsibility of the Agency to ensure that a maximum export program shall be developed consistent with the accomplishment of overall objectives in Germany and in conformity with the policy of the two Governments to transfer responsibility to German administration as rapidly as is feasible."

Capitol has no rights here except those originally held by Telefunken under their original racist contracts.

Certainly no extended citations are necessary to establish the fact that contracts so contrary to public policy of the United States as the basic Telefunken contracts here cannot be enforced by this Court. If these contracts had been made here they would be unenforceable. They gain no sanctity by having been made under Hitler. Recently, in fact, the United States Supreme Court has had the opportunity to pass specifically upon business discrimination on racial grounds in the so-called "restrictive covenant" cases (*Shelley* v. *Kraemer*, 334 U. S. 1, 68 S. Ct. 836 (1948)).

In that case the court enforcement of private agreements generally described as restrictive covenants was before the United States Supreme Court. These covenants have as their purpose the exclusion of persons of certain race or color from certain property rights. The Court said:

> "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the states have denied petitioners the equal protection of the laws and that, therefore, the action of the State cannot stand" (p. 20).

Under all the circumstances it seems an extreme presumption to call for the aid of an American Court to enforce the contracts of a parent so morally diseased and so steeped in public opprobrium as the parent in this case. It seems impossible to defendant-appellant that such aid can be successfully invoked.

The best summary yet written of defendant-appellant's position here is that of the United States Supreme Court in *Hood* v. *Hodge*,[5] where the Court stated:

> "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Con-

[5] 334 U. S. 1 (1948). Italics supplied. This was a restrictive covenant case.

stitution, treaties, federal statutes and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the *obligation of courts to refrain from such exertions of judicial power*" (p. 34).

POINT IV

Failure to join indispensable parties is fatal to the claim of plaintiff-appellee here.

An indispensable party is one whose "absence will prevent an effective determination of the controversy" and whose "interests are not severable and would be inequitably affected by a judgment rendered between the parties before the Court."[16]

Under this established rule Gramophone Works National of Czechoslovakia is an indispensable party.

Mercury, defendant-appellant here, is a licensee of G.W.N.C. It received possession of these masters only by contract with G.W.N.C. (of November 6, 1947)[17] and has no other claim to title or possession thereof.

Indeed, the Court below specifically passes upon the rights of the licensor G.W.N.C. by saying:

> "The confiscation of the circular metal discs, known as matrices, did not invest the Czechoslovakian government with the right to reproduce records from the matrices and distribute them beyond the Czechoslovakian borders, or to license others situated beyond the * * * borders to reproduce records from the said matrices * * *" (p. 3838).

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[16] *Mahr v. Norwich Union F. I. Soc.*, 127 N. Y. 452, *Wittenberg et al. v. Banca Commerciale Italiana*, 1948 (273 App. Div. 888, 1st Dept.); *Horan v. Pioneer Credit Corp. et al.*, 1947, 247 App. Div. 971, *Shields v. Barrow*, 17 How. 130, 131, *Tucker v. Ruther*, 101 F. 2d 230, (C. A. D. C. 1939).

[17] Supr. par. 3 a.

The cases are clear that when a lessor and a lessee are involved in litigation, the lessor is indispensable with the lessee.

Thus in the case of mining rights, a situation directly analogous to this case, the lessor is an indispensable party: [8]

> "The value of her royalties, rights and privileges according to the terms of the lease depended on successful mining operations to be conducted by the lessee. Anything that would interfere with or prevent his production of oil or gas on the leased premises necessarily affected, reduced or extinguished her royalties in kind or cash and other privileges which depended on such production * * *.
>
> "In the case now before us the complainant's right to the injunctive relief * * * necessarily depends upon the validity of the (defendant's lessor's) lease. The question of its validity lies at the foundation of their right of action * * *. She is, therefore, * * * an indispensable party" (pp. 548, 550).

State of Washington v. *United States*, 87 F. 2d 421 (C. C. A. 9, 1936), is also directly apposite. There a lessee was before the Court on a land claim and it was held that even though the interests of the lessee were severable from those of the lessor the lessor (State of Washington) was an indispensable party. The Court said:

> "* * * The Court must make a determination of the following questions applicable to the particular case: 1. Is the interest of the absent party distinct and severable? 2. In the absence of such party can the Court render justice between the parties before it? 3. Will the decree made in the absence of such party have no injurious effect on the interest of such absent party? 4. Will the final determination, in the absence of such party, be consistent with equity and good

[8] *MacDonnell* v. *Dennis*, 153 F. 547 (8th Cir. 1907).

To the same effect is *South Penn Oil Co.* v. *Miller*, 175 F. 720 (6th Cir. 1909), in which lessees of rival lessees to oil land were held indispensable parties on the same grounds.

> conscience? * * * If any one of the four questions is answered in the negative, then the absent party is *indispensable*" (p. 428).

It is respectfully submitted that any decree in behalf of plaintiff in this action will necessarily have "an injurious effect on the interest" of G.W.N.C.

The position of G.W.N.C. here is the position of the lessor, whose title is the sole basis of the claim of the lessee. The lessee's position, therefore, cannot be appraised without a determination of the position of the lessor, and G.W.N.C. was, therefore, an indispensable party.

There is also strong legal precedent to include Telefunken, G.M.B.H., as an indispensable party. For many years it has been the rule in patent litigation that the licensee alone (Capitol here) cannot bring an action for infringement.[29] This rule has been followed also in copyright and trade mark cases.[30] There is every reason, practical and legal, for the requirement that both these parties should be before the Court if the one (Telefunken) seeks to invoke the aid of an American Court to prevent the other from selling this property on the American market.

This is especially true since Telefunken is an enemy alien and is subject to the seizure of its property by the Alien Property Custodian of the United States. If joined in this action, therefore, its joinder would require the intervention of the Alien Property Custodian as an interested party.[31] The Joint Resolution of the 82d Congress terminating the war with Germany specifically reserved

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[29] *Waterman v. MacKenzie*, 138 U. S. 252, 11 S. Ct. 334. Moore, 2d Ed., Vol. 3, p. 1359. *Independent Wireless Tel. v. RCA*, 269 U. S. 459, at 468.

[30] *Widenski v. Shapiro*, 147 F. 2d 909, *Judd v. Time Comics*, 89 F. Supp. 611.

[31] 50 U. S. Code Appendix 1-31, especially 7 (c).

the powers of the Alien Property Custodian over alien assets.[52]

For the above reasons, G.W.N.C. of Prague is certainly an indispensable party, and Telefunken of Berlin is likewise included, and the failure to join either in this action is a fatal error.

POINT V

Failure of the Court below to find facts and state separately its conclusions of law thereon, pursuant to Equity Rule 70½ and Rule 52, R. C. P., 28 U. S. C. A., was error and was highly prejudicial to defendant-appellant.

a. In this case Plaintiff-Appellee claimed thirty-four records sold by Defendant-Appellant.

But it produced German contracts purporting to cover only twenty-six of them.[53]

Yet the injunction below enjoins Mercury from selling all thirty-four.

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[52] H. J. Res. 289, Approved Oct. 19, 1951

[53] Plaintiff produces two contracts between Telefunken and Frau Sack, covering the periods

October 1, 1934 to September 30, 1935
(Stip par 4, Ex B, par 10)

January 1, 1937 to December 31, 1938
(Stip par 4, Ex D, par 9)

Eight of the works in issue were not recorded within the dates covered by these contracts. These works are (Stip. par. 4, Ex. N.)

La Folletta	recorded	June 12, 1936
If Roses are offered in Tyrol	recorded	Nov. 7, 1935
Canzonetta	recorded	June 12, 1936
I am in Love	recorded	Aug. 24, 1934
No One Loves You etc.	recorded	Nov. 7, 1935
On the Beautiful Blue Danube	recorded	June 12, 1936
When a Lovely Lady Falls etc.	recorded	Aug. 24, 1934
Village Swallows From Austria	recorded	June 23, 1933

Counsel respectfully hazards a guess that this is one of the few instances in federal jurisprudence where an injunction has been issued on the basis of phantom contracts.

This was possible only because the Court below failed to file findings of fact in respect of the claims made by the parties. Defendant Mercury below strongly asserted that it should not be enjoined on the basis of imaginary foreign contracts (Point IV of its brief below).

The Court below did state in its opinion that:

> "The question raised (of the phantom contracts) is related to the measure of damages" (p. 349).

and referred it to the Master.

But in this respect the Court below is in error, since the decree below also enjoins Mercury from selling any of these eight numbers and thus indulges an assumption that Capitol will produce "secondary proof" of these crystal ball contracts to justify such injunction retrospectively.

But Capitol had about four years between the filing of this action and the decree as issued to produce such contracts if they existed. The trial was concluded on March 18, 1952. The injunction of Mercury in this respect, therefore, was not only an assumption of the existence of non-existent documents, but the referral of this matter to a master was directly contrary to Equity Rule 59 which states:

> "Save in matters of account, a reference to a master shall be the exception, not the rule, and *shall be made only upon the showing that some exceptional condition requires it.*" (Italics supplied.)

There is no "exceptional condition" here requiring the mystery of the phantom contracts to be referred to a master. Plaintiff below failed to produce them and defendant Mercury was entitled to a finding of fact under Equity Rule 70½ that they had not been produced.

"The findings and conclusions should adequately cover the contested issues." [51]

and this is so, according to the case cited, even though the opinion in the District Court includes some facts and conclusions.

b. The Court below also suggests, though it does not specifically find as a conclusion of law, that the acts of defendant Mercury here constituted unfair competition.

Here, too, a specific finding would have greatly simplified this appeal, since thirty and one-third of the thirty-four records here were either produced first in the United States by defendant Mercury or produced alone by Mercury.[52]

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[51] *Life Savers Corp. v. Curtiss Candy*, 182 F. 2d 4 (7th Cir. 1950) at page 7.

Also, in *Desch v. U. S.*, 180 F. 2d 623 (7th Cir. 1951), the Court stated:

"The trial court should make such subsidiary findings of fact as will support the ultimate conclusions reached by the Court * * * Findings should be sufficient to indicate the factual basis for the ultimate conclusions of the court" (p. 685).

[52] A tabulation follows from Exhibit N, par. 4, of the stipulation

RELEASED BY DEFENDANT MERCURY ALONE

Out in the Sievering	August 1, 1949
If Roses are offered in Tyrol	August 1, 1949
The Glow Worm	August 1, 1949
Under the Lime Tree	August 1, 1949
Canzonetta	August 1, 1949
Una Voce Poco Fa	April 1, 1950
Quel Guardo il Cavaliere	April 1, 1950
Caro Nomu	April 1, 1950
Den Tueren zu Versoehnen	April 1, 1950
I am in Love	April 1, 1950
Once I was Tight and Tipsy	April 1, 1950
This is the Finest Day etc	April 1, 1950
I was never in Love etc.	April 1, 1950
No One Loves You etc.	May 1, 1949
On the Beautiful Blue Danube	May 1, 1949
Gold and Silver Waltz	May 1, 1949
Laughing Waltz	May 1, 1949

(Continued on page 30.)

Such a finding, plus the fact that there was no copyright protection at any time in the United States for these works, would have required the Court below to hold that since it was the business initiative and ingenuity of Mercury that brought these works here, and that they were prior in time with the vast number of them on the American market, the unfair competition, if any, was actually by plaintiff-appellee against defendant Mercury. A counterclaim to this effect was asserted by Mercury.

Since no such conclusion of law was stated, however, it is only possible to state that defendant Mercury was prior in time with an overwhelming number (more than thirty) of the thirty-four records; that it transcribed to the modern thirty-three and one-third rpm discs at its own expense (Stip. par. 4, Ex. X) and that after defendant Mercury had accomplished all this, comes plaintiff with a later contract to claim unfair competition.

(Continued from page 29)

Ay Ay Ay	May	1, 1949
When a lovely Lady Falls in Love	May	1, 1949
Viem Viem	May	1, 1949
Village Swallows from Austria	July	1, 1949
Don Juan (recorded in Amsterdam)	May	1, 1949
Sleep Baby Sleep	May	1, 1949

EIGHT RELEASED BY BOTH PLAINTIFF AND DEFENDANT OF WHICH DEFENDANT MERCURY WAS PRIOR IN TIME WITH RELEASE DATE.

Overture 1812	*Mercury*	May 1, 1949	Capitol later
Emperor Waltz	*Mercury*	Aug. 1, 1949	Capitol later
La Bolleria	*Mercury*	Aug. 1, 1949	Capitol later
Perla Vals	*Mercury*	Aug. 1, 1949	Capitol later (except two-thirds)
My Dear Marquis	*Mercury*	May 1, 1949	Capitol later
I'll Play the Innocent	*Mercury*	May 1, 1949	Capitol later
Caribbean	*Mercury*	May 1, 1949	Capitol later
Symphony No. 4	*Mercury*	July 1, 1950	Capitol later

THREE RELEASED BY BOTH PLAINTIFF AND DEFENDANT OF WHICH PLAINTIFF CAPITOL WAS PRIOR IN TIME WITH RELEASE DATE

The Carol Party	*Capitol*	Sept. 5, 1949	Mercury later
Voices of Spring	*Capitol*	April 1, 1949	Mercury later
Fiesta Tzanado	*Capitol*	May 2, 1949	Mercury later

This, it seems to defendant-appellant Mercury, is an upside-down legal world which is the more aberrant because of failure of the Court below to file findings of fact and conclusions of law, as provided by the Rules. Such findings of fact, if made, would necessarily have sustained Mercury's right to recover on its counterclaim.

CONCLUSION

The decision below must be reversed.

A brief restatement of the facts is the strongest summary for defendant-appellant Mercury.

These facts are:

a. All the works in controversy were enemy owned and seized as war reparations by Czechoslovakia in October 1945.[56]

b. This seizure, and the right to "dispose" of enemy assets, were confirmed by our government and seventeen other countries in the Treaty of Paris, January 24, 1946.[57]

c. Mercury acquired the right to produce these records from the Czech government on about November 6, 1947.[58]

d. About a year later, plaintiff-appellee Capitol contracted with the original German owners for the same records (October 1, 1948)[59]

e. None of the records was copyrighted.[60]

f. It is conceded that Mercury did not use the Telefunken name or the Capitol name in the marketing of these records.[61]

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[56] Stip. par. 3 m, par. 4 c
[57] Footnotes 12, 51, supra
[58] Stip. par. 3 n
[59] Stip. par. 3 o
[60] Stip. par. 3 p, q
[61] Stip. par. 3 r.

g. Mercury was prior in time on the American market with more than thirty of the thirty-four records, being the sole producer of twenty-three of them.[62]

h. Mercury also absorbed the expense and effort of converting these records to thirty-three-and-one-third rpm from the original seventy-eight rpm, for the current American market.[63]

i. All of the records were produced under German law between 1933 and 1941, and the original rights of Telefunken therefore accrued under Nazi racist laws.[64]

j. Even though the sole right of Telefunken and thereby Capitol to produce these records accrued under contracts initially with Telefunken, no such contracts are produced in the case of eight of these thirty-four records.[65]

k. No findings of fact or conclusions of law were filed by the Court below.

Under these facts Mercury, which claims under the prior Czech agreement, and which has been prior in bringing all but four of the thirty-four records to the American market, has been enjoined from further production and has been ordered to pay loss of profits and damages to Capitol.

This, it is submitted, is error, for:

A. In the absence of copyright there is no property right in an artistic performance as such.

B. The Treaty of Paris in any event gave Prague the right to "dispose" of this property as it saw fit, which necessarily included sale in the United States.

C. All rights of Capitol-Berlin, plaintiff-appellee here, stem from contracts made under the Reich Culture Chamber

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[62] Footnote 55, supra
[63] Stip. par. 4, Ex. X
[64] Stip. par. 3 u, bb
[65] Footnote 53, supra

which were contrary to our public policy and cannot be enforced in our Courts.

D. Though all the rights of Mercury come from Prague and all the rights of Capitol from Berlin, neither indispensable party of origin has been joined here.

E. Substantial rights of defendant are prejudiced here by the failure of the Court below to file findings of fact and conclusions of law.

For the above reasons, or any of them, the judgment below must be reversed, the injunction lifted, and defendant-appellant Mercury must have judgment on its counterclaim.

Respectfully submitted,

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~~22977~~

United States Court of Appeals

FOR THE SECOND CIRCUIT

CAPITOL RECORDS, INC.,

Plaintiff-Appellee,

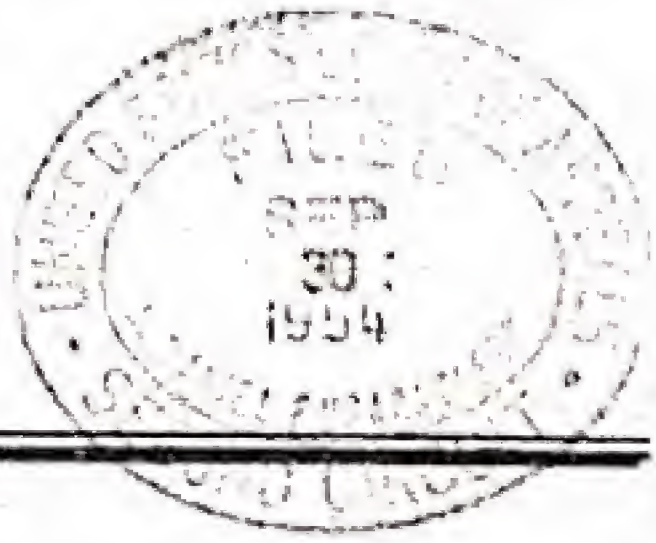
against

MERCURY RECORDS CORPORATION,

Defendant-Appellant.

APPENDIX TO PLAINTIFF-APPELLEE'S BRIEF

ARTHUR E. GARMAIZE,
Attorney for Plaintiff-Appellee.



INDEX

3. The parties stipulated the following facts:

See Paragraph 3 as annexed hereto.

3. The parties stipulated the following facts:

(a) * * *

(Page 4 of Paragraph 3 of Court Order)

(1) Telefunken and Ultraphon Actien Gesellschaft Fur Grammophon Industrie Und Handel of Prague, prior to the issuance of the Nationalization and Confiscation Decrees in 1945, had not terminated their agreement entered into in 1911.

2

4. The parties agreed that the following documents, which were marked for identification, may be received in evidence:

See Paragraph 4 as annexed hereto

4. The parties agreed that the following documents, which were marked for identification, may be received in evidence:

(a) * * *

(b) * * *

(Page 1 of Paragraph 4 of Court Order)

(c) Exhibit K: The Nationalization Decree and Confiscation Decree issued in 1945 known as Collection of Laws and Regulations respectively No. 100 and No. 108; 3

Notices of Decrees issued by the Minister of Industry:
(Page 2 of Paragraph 4 of Court Order)

Exhibit L: No. 923 dated December 27, 1945;

Exhibit M: No. 925 dated December 27, 1945;

Exhibit N: No. 1251 dated March 7, 1946;

Exhibit O: No. 3173 dated November 27, 1948;

Exhibit P: No. 3174 dated November 29, 1948.

All of the above exhibits (K thru P) are contained in and are translations of the Gazettes as official publications of the Government of Czechoslovakia and are effective in accordance with their purport.

(d) * * *

(i) Exhibit V: Translation of the Act of May 22, 1940 amending the Copyright Act of Germany of 1901 with
5 respect to rights of performances as published on pages 43 and 44 of the International Labor Conference, 26th Session, Geneva, 1940.

(j) Exhibit W: Translation of the Act of Czechoslovakia of November 24, 1926 concerning authors' rights with respect to rights of performances as published on page 42 of the International Labor Conference, 26th Session, Geneva, 1940.

Exhibit K.

6 The Decree of the President of the Republic of Czechoslovakia of October 25th, 1945 concerning confiscation of enemy property and Funds of National Restoration, published under No. 108 in the Coll. contains in Section 1, subdivision 2 a provision confiscating without compensation the property of the persons mentioned in Section 7, subdivision "1(b)" of the Nationalization Decree No. 100 of October 24th, 1945 mentioned immediately below.

Exhibit K.

The Decree of the President of the Republic of Czechoslovakia of October 24th, 1945 on the Nationalization of Mines and Some Industrial Enterprises, published under No. 100, Coll. which Decree has the force of a statute, provides as follows:

Section 1.

"On the day of promulgation of this Decree, the following enterprises are nationalized by becoming State owned:

1 to 26. * * *

27. The manufacture of gramophone records * * *

Section 4.

Subd. 1. By the nationalization the Czechoslovak State acquires the ownership of the nationalized enterprises to the extent stated below:

Subd. 2. Nationalization effects all immovable property, buildings and installations serving the operation of the nationalized enterprise, all its accessories, including all rights (patents, licenses, trade marks, designs, etc.), bills, securities, deposit books, cash and outstanding assets, all finished and unfinished goods, half finished goods, stocks and materials which belong to the enterprise on the day when this Decree comes into force. Places of deposits of raw materials, as well as movable property and rights permanently serving the operation of the enterprise are subject to the nationalization, even where they belong to persons other than the owner of the enterprise.

Subd. 3. All ancillary enterprises and works belonging to the same owner, as well as all enterprises and works forming an integral part of the nationalized en

terprise, are nationalized along with the latter, to the extent stated in subd. 2.

Subd. 4. If the nationalized enterprise belongs to limited liability company, joint-stock company, or mining concern with a very large capital, or in which holdings are in many hands, or whose business covers a wide field, all its property is nationalized, together with concerns in which the company owns more than half the capital or which it controls.

Subd. 5. In the case of owners other than those covered by subd. 4, the Minister of Industry, in Slovakia in agreement with the Delegate for Industry and Trade, will exempt from nationalization single properties, or whole sets, or rights that are not indispensable to the operation of the nationalized enterprises, and leave them with the present owner.

11

SECTION 3.

Subd. 1. A national enterprise (Sec art. 12) which takes over the property of a nationalized enterprise, also assumes its obligations on the vesting date * * *

SECTION 7.

Subd. 1. For nationalized property which at the time of the actual termination of enemy occupation and of the Nazi or Fascist regime undoubtedly belonged, or still belongs to persons mentioned below, no compensation is paid:

12

a) To the German Reich, the Kingdom of Hungary, to public bodie * * *

b) To persons of German or Hungarian nationality, with the exception of those who can prove that they have remained loyal to the Czechoslovak Republic, have

never committed offences against the Czech and Slovak nations, and have either actively participated in the fight for the liberation of the Republic or suffered under Nazi or Fascist terror.

SECTION 12.

Subd. 1. The nationalized enterprises and the concerns in the nationalized branches previously under public ownership will be formally constituted as national enterprises by the Minister of Industry in agreement with the Minister of Finance, in Slovakia also in agreement with the Delegates for Industry and Trade and for Finance.

Subd. 2. The setting up of a national enterprise will be promulgated in the Czech and Slovak Official Gazettes (Urední list and Úradny vestník).

SECTION 13.

Subd. 1. National enterprises are under public ownership, as defined in subsequent regulations, and they have the status of independent bodies corporate. They are regarded as firms enjoying all rights, and subject to taxation as firms publishing annual accounts. They must pay duty according to the legal rules, and duty equivalents from the date of their establishments, as per Section 1, subd. 2, a), of the Act of April 8th, 1938, No. 76 on duty equivalents.

Subd. 2. The net value of the substance transferred to a national enterprise by the State, constitutes its original capital. The day when the national enterprise is vested with the property belonging to it, will be promulgated in the Official Gazettes."

16

Exhibit L.

TRANSLATION

Official Gazette of the Czechoslovak Republic
of March 30, 1946 Pg. 709

923

Notice of the Minister of Industry of
December 27, 1945

Pursuant to sec. 1, subd. 4 of the Decree of the President of the Republic dated October 24, 1945 No. 100 Coll. on Nationalization of Mines and Some Other Industrial Enterprises, I decree that the enterprise

17 Telefunken über drahtlose Telegraphie G.m.b.H.
with the seat in Berlin

as to enterprises situated within the boundaries of the Czechoslovak Republic be nationalized on October 27, 1945 by becoming State owned, because it is an enterprise for manufacture of records according to sec. 1, par. 1, No. 27 of the said Decree.

Through this nationalization, the Czechoslovak State acquires the ownership of the nationalized enterprise to wit: of all real property, buildings and installments serving the operation of the nationalized enterprise, all accessories of the enterprise including all rights (patents, licenses, franchises, trade marks, samples, etc.), notes, securities, deposit

18 books cash and outstanding assets belonging to the enterprise, all finished and unfinished goods, semi manufactures, stocks and materials which belonged to the enterprise on the day when this decree comes into force. Places of deposit of raw material, personal property and rights permanently serving the operation of the enterprise are affected by the nationalization, even if they belong to persons other than the owner of the enterprise.

Exhibit L.

Together with this enterprise, all ancillary enterprises and works belonging to the same owner, as well as all enterprises and works forming an integral part of the nationalized property are nationalized along with the latter to the extent stated in sec. 4, par. 2 of the said Decree.

As the nationalized enterprise belongs to a corporation which is financially very strong, all its capital is nationalized pursuant to sec. 4, subd. 1 of the Decree, along with subsidiaries belonging to the main enterprise, where the main enterprise has more than one half of the capital or where it has a controlling interest.

This Decree comes into force on the day of promulgation.

MINISTER OF INDUSTRY
B. LAUSMAN

Exhibit M.

TRANSLATION

OFFICIAL CZECHOSLOVAK GAZETTE OF
MARCH 30, 1946
p. 709

925

NOTICE OF THE MINISTER OF INDUSTRY OF
DECEMBER 27, 1945

By virtue of sec. 1, subd. 1 of the Decree of the President of the Republic of October 24, 1945 No. 100 Coll. on the Nationalization of Mines and Some Industrial Enterprises I hereby give notice that the enterprise known as

"Graphone Stock Company for Gramophone
Industry and Trade"
with the seat in Prague

was nationalized by becoming State owned as of October 27, 1945, because it is an enterprise for the manufacture of

gramophone records pursuant to sec. 1 subd. 1, No. 27 of the said Decree.

Through this nationalization, the Czechoslovak State acquires the ownership of the nationalized enterprise to wit: of all real property, buildings and installations serving the operation of the nationalized enterprise, all its accessories, including rights (patents, licenses, franchises, trade marks, samples, etc.), notes, securities deposit books, cash and outstanding assets belonging to the enterprise, all finished and unfinished goods, semi-manufactures, stocks and materials which belong to the enterprise on the day when this decree comes into force. Places of deposits of raw materials, per-
23 sonal property and rights permanently serving the operation of the enterprise are affected by the nationalization, even if they belong to persons other than the owner of the enterprise.

Together with the enterprise, all ancillary enterprises and works belonging to the same owner, as well as all enterprises and works forming an integral part of the nationalized enterprise are nationalized along with the latter to the extent stated in sec. 4, subd. 2 of the Decree.

As the nationalized enterprise belongs to a corporation which is financially very strong, all its capital is nationalized pursuant to sec. 4, subd. 4 of the Decree, along with subsidiaries belonging to the main enterprise, where the main en-
24 terprise has more than one half of the capital or where it has a controlling interest.

This Decree comes into force on the day of promulgation.

THE MINISTER OF INDUSTRY
B. LAUSMAN

9a

25

Exhibit N.

TRANSLATION

OFFICIAL CZECHOSLOVAK GAZETTE of
MAY 16, 1946 page 989

1251

DECREE OF THE MINISTER OF INDUSTRY of
MARCH 7, 1946

Pursuant to sec. 12 of the Decree of the President of the Republic of October 24, 1945 No. 100, Coll. on the Nationalization of Mines and Some Industrial Enterprises, I establish, together with the Minister of Finance a national 26
enterprise, according to sec. 1, of the Government Decree of January 15, 1946 No. 6, Coll. regulating national industrial enterprises. I designate the name of the firm, the purpose of the enterprise, its seat and number of directors (deputies) as follows:

A. The name of the firm:

"Gramophone Works, National Enterprise."

B. Field of Activity: the manufacture, the acquisition and disposal of phonograph records and other sound equipment electrical, acoustical and other sound reproducing apparatus, their spare parts and accessories as well as the licenses governing these enterprises 27
which flow into the Gramophone Works National Corp.

C. Seat: Prague.

D. Number of Directors: 6 and the same number of deputies.

28 *Exhibit N.*

E. Pursuant to Sec. 32, subd. 2 of the Government Decree No. 6, 1946 Coll. the Gramophone Works, National Enterprise will be under the direction of the Central Organ for Leather and Rubber Industry.

F. Pursuant to sections 12 and 13 of the Decree of the President of the Republic No. 100/1945 Coll. sections 1 and 17 of Government Decree No. 6/1946 Coll., the Czechoslovak State transfers as of January 1, 1946 from the Properties of Nationalized Enterprises the following properties and rights to the "Gramophone Works National Enterprise":

29 1. The properties of the enterprise Deutsche Gramophone G.m.b.H. with the seat in Berlin to the extent of its nationalization.

2. The properties of the enterprise ESTA, spolecnost s r.o. with the seat in Prague to the extent of its nationalization.

3. The properties of the enterprise Telefunken Drahtlose Telegraphie G.m.b.H. with the seat in Berlin to the extent of its nationalization.

4. The properties of the enterprise Ultraphon, akciova spolecnost pro prumysl a obchod gramofony, with the seat in Prague to the extent of its nationalization.

30 5. The properties of the enterprise The Gramophone Company (Czechoslovakian) Ltd., spolecnost s ru cenym omezenym with the seat in Prague to the extent of its nationalization.

G. "Gramophone Works, National Enterprise," assumes the obligations of nationalized enterprises cited under F as of January 1, 1946.

Exhibit N. 31

II. The net value of the properties taken over by "Gramophone Works, National Enterprise" as of January 1946 represents its capital.

THE MINISTER OF INDUSTRY
B. LAUSMAN

Exhibit O.

TRANSLATION

OFFICIAL CZECHOSLOVAK GAZETTE OF
DECEMBER 12, 1948 p. 2212 32

3173

DECREE OF THE MINISTER OF INDUSTRY OF
NOVEMBER 27, 1948

on the nationalization of an enterprise according to Decree No. 100/1945 Coll.

By the Decree of December 27, 1945 No. 923/1946 and No. 874 Official Gazette, the Minister of Industry announced that the enterprise Telefunken fuer drahtlose Telegraphie G.m.b.H. with the seat in Berlin, as far as it comprises enterprises located within the Czechoslovak Republic was nationalized by becoming State owned as of October 27, 1945 pursuant to sec. 1, subd. 1, No. 27 of the Decree of the 33
President of the Republic, dated October 24, 1945 No. 100 Coll., on the Nationalization of Mines and Some Industrial Enterprises.

Pursuant to sec. 1, subd. 5, of the said decree Art. II of the Law No. 114/1948 Coll., I decree that along with the aforesaid enterprise, according to sec. 1, subd. 2 of this decree the enterprise:

34 *Exhibit O.*

Telefunkenplatte G.m.b.H., Berlin be nationalized, as far as its property and furnishings are located within the Czechoslovak Republic, because it is an enterprise which forms together with the nationalized enterprise an economical entity and is decisively controlled by the nationalized enterprise pursuant to Subd. 5, of the said Section.

This decree comes into force on the day of promulgation.

MINISTER:
KLEMENT.

Exhibit P.

35

TRANSLATION

OFFICIAL CZECHOSLOVAK GAZETTE OF
DECEMBER 12, 1948 page 2212

3174

DECREE OF THE MINISTER OF INDUSTRY OF
NOVEMBER 29, 1948

on the embodiment of a nationalized enterprise into the "Gramophone Work, National Enterprise."

A. Pursuant to sec. 12 of the Decree of the President of the Republic of October 24, 1945 No. 100 Coll. on the Nationalization of Mines and Some Industrial Enterprises in Article II of the Law of April 28, 1948 No.
36 114 Coll., on Nationalization of some additional Industrial and other Enterprises and Works and on regulations of some conditions of nationalized and national enterprises, I embody together with the Minister of Finance as of January 1, 1946 the property of the nationalized enterprise

Telefunkenplatte G.m.b.H., Berlin

to the extent of its nationalization into Grammophone Works, National Enterprise.

B. As of January 1, 1946, the Grammophone Works, National Enterprise takes over the obligations of the nationalized enterprise, mentioned in the section A.

C. The properties of the nationalized enterprise mentioned in A. are a part of the properties which the Grammophone Works, National Enterprise takes over as of January 1st, 1946 and its net value constitutes its original capital.

MINISTER:
KLEMENT

38

Exhibit V.

GERMANY

RIGHTS OF PERFORMANCE

Pages 43-44 of Report A of the Twenty-Sixth Session of the International Labor Conference, held in 1950 at Geneva, Switzerland, translates the Act of May 22, 1910 amending the Copyright Act of Germany of 1901 as follows:

"The author of a work shall mean the person who has written it. In the case of a translation, the translator, and in the case of an adaptation, the adapter, shall be considered as the 'author.'

39

"If a literary or musical work is recorded by means of a personal performance before a device for use in connection with instruments for the mechanical reproduction of sound, the record thus made shall be considered equivalent to an adaptation of the work. The same shall apply to recording by perforation, stamping, punching, the fixing of pins and staples, and similar processes, if such recording can be regarded as an ar-

40 *Exhibit V.*

tistic activity. The following shall be considered as an adapter: (a) the performer, in the case referred to in the first sentence of this paragraph; (b) the person who effects the recording in the case referred to in the second sentence."

Exhibit W.

CZECHOSLOVAKIA

RIGHTS OF PERFORMANCE

Pages 41-42 of Report A of the Twenty-Sixth Session
41 of the International Labor Conference, held in 1940 at Geneva, Switzerland, translates the Act of Czechoslovakia of November 24, 1926 concerning authors' rights, as follows:

"Section 9.—Author, Adapter.

"(1) The author of a work shall mean the person who created it. The author of an adaptation (adapter) (section 7) shall mean a person whose activities have resulted in producing an adaptation of a personal character.

"(2) Except as otherwise specified, the adapter of a work for screen production shall be held to be the director; in the case of the adaptation of a work for
42 instruments or apparatus for mechanical reproduction, he shall be the person who performs such adaptation or, in the case of choral or orchestral adaptation, the person who conducts it (conductor), and in the case of the transposition of the work by its technical arrangement for reproductive machinery or parts thereof, the person whose activity determines the nature of the reproduction."